No. 15310

United States
Court of Appeals
for the Ninth Circuit

SUNLAND INDUSTRIES, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-28-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States, Northern Division, Southern District of California

Civil Action, No. 1162-ND

SUNLAND INDUSTRIES, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO RECOVER INTERNAL REVENUE TAXES

The above-named Plaintiff for its complaint alleges as follows:

1. Plaintiff, Sunland Industries, Inc., is, and at all times material hereto has been, a corporation duly organized and existing under the laws of the State of California, maintaining its principal office at Fresno, Fresno County, California.

2. Upon information and belief, on or about the 1st day of January, 1943, Harold A. Berliner became the duly appointed and qualified Collector of Internal Revenue of the United States for the First District of California and continued to act as such until on or about March 31, 1945, at which time he ceased to hold the office of Collector of Internal Revenue of the United States for the First District of California.

3. Upon information and belief, on or about the 14th day of May, 1945, James G. Smyth became the duly appointed and [2*] qualified Collector of Internal Revenue of the United States for the First District of California, and continued to act as such until on or about the 27th day of September, 1951, at which time he was removed from office.

4. On or about March 15, 1944, Plaintiff filed, in the office of the Collector of Internal Revenue of the United States for the First District of California its excess profits tax return for the year 1943, showing the total amount of its excess profits tax for said year as $193,238.42.

5. Thereafter as the result of audit by the Bureau of Internal Revenue the total excess profits tax liability of Plaintiff for said year was determined to be $194,881.09.

6. Plaintiff, on or about the following dates, made the following payments totaling $129,469.76 on its excess profits tax liability for 1943 to the Collector of Internal Revenue for the First District of California: March 15, 1944—$32,367.44; June 12, 1944—$32,367.44; September 14, 1944—$32,367.44; December 12, 1944—$32,367.44.

7. Prior to December 14, 1949, the only payment of excess profits taxes for 1943 made by Plaintiff in addition to those set forth in paragraph 6 was the sum of $1,318.28 which was paid to the Collector

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

of Internal Revenue for the First District of California on or about September 10, 1948.

8. On December 14, 1949, Plaintiff paid to the Collector of Internal Revenue for the First District of California the sum of $78,130.71, constituting payment of $58,089.75 excess profits tax liability for 1943 and $20,040.96 interest accrued under Section 294 of the Internal Revenue Code. [26 U.S.C. Section 294.]

9. On December 23, 1949, Plaintiff duly filed with the Collector of Internal Revenue for the First District of [3] California a refund claim for excess profits taxes paid in respect of the calendar year 1943 in the amount of $78,130.71 with interest on the grounds that such tax and interest was paid after the expiration of the period of limitation properly applicable thereto. [Internal Revenue Code Section 3770 (a) (2), 26 U.S.C. Section 3770 (a) (2).] A full, true and correct copy of said claim for refund is attached hereto as "Exhibit A" and is incorporated by reference herein the same as though set forth in full. This claim was rejected by the Commissioner of Internal Revenue on or after May 11, 1950, and Plaintiff was notified by registered mail on or after said date. The facts set forth in paragraphs 4, 8, 12, 13, 14, 15, 16, 17, 18, 19 and 20 were set forth in said refund claim as the ground thereof.

10. Inasmuch as all Collectors to whom all of Plaintiff's payments of 1943 excess profits taxes and interest were made are out of office, this suit

is brought against the defendant, United States of America, pursuant to Title 28, United States Code, Section 1346.

11. This action arises under the laws of the United States providing for internal revenue, as hereinafter more fully appears.

12. While the total amount of excess profits tax liability of Plaintiff for 1943 shown on its return as described in paragraph 4 above was $193,238.42, Plaintiff paid only the total sum of $129,469.76 prior to audit by the Bureau of Internal Revenue because on line 17 of said return opposite the caption "Amount deferred by reason of the application of Section 710 (a) (5) (relating to abnormality under Section 722) (attach schedule)" Plaintiff entered this statement, "In accordance with claim on file 1942," and the sum of $63,768.68, [4] which said sum was deducted from the total amount of excess profits tax set forth on said return as stated in paragraph 4 above. Attached hereto as "Exhibit B," for convenient reference only, is a full, true and correct copy of Section 710 (a) (5) of the Internal Revenue Code. [26 U.S.C. 710 (a) (5).] Attached hereto as "Exhibit C," for convenient reference only, is a full, true and correct copy of Regulations 112, Section 35.710-5, promulgated by the Commissioner of Internal Revenue, approved by the Secretary and in effect at the time Plaintiff filed its 1943 excess profits tax return.

13. Plaintiff did not file with its return an application for relief under Section 722 of the Internal

Revenue Code for the year 1943, nor was any explanatory schedule attached to said return, nor did taxpayer file such application for relief at any time during 1944 and no application was filed until on or about March 9, 1946.

14. Neither the excess profits tax return for 1943 nor any schedules or other documents attached thereto or filed therewith set forth under oath each ground under Section 722 upon which the claim for relief was based nor facts sufficient to apprise the Commissioner of the exact basis thereof nor to establish eligibility for relief nor to establish the amount of constructive average base period net income claimed or the amount of tax reduction claimed by the use of Section 722.

15. Plaintiff was deemed not to have claimed the benefits of Section 722 of the Internal Revenue Code on its return for the year 1943 and was not entitled to deferment of any portion of its excess profits tax for said year under Section 710 (a) (5) of the Internal Revenue Code. [26 U.S.C. 710 (a) (5).]

16. Subsequent to the filing of said excess profits tax return and prior to March 15, 1947, Plaintiff entered into an agreement, the exact date of which is unknown to [5] Plaintiff, with the Commissioner of Internal Revenue extending the period within which additional excess profits taxes for said year could be assessed to and including June 30, 1949, which said agreement further provided to the effect that the period within which claims for refund

could be filed by Plaintiff for excess profits taxes paid with respect to said year would expire on December 31, 1949. No other agreement further extending said period was ever entered into by Plaintiff.

17. The Collector of Internal Revenue for the First District of California made the following assessments of Plaintiff's excess profits taxes for the year 1943: $129,469.74 assessed on or about March 15, 1944, under original account Number 400824; $1,100.59 assessed on or about August 20, 1948, under Additional Account Number 529048. At no time prior to July 1, 1949, was any portion of the amount of excess profits tax for the year 1943 in excess of the sum of $130,570.33 assessed nor were any proceedings for the collection thereof instituted or prosecuted.

18. Together with the payments described in paragraph 8, Plaintiff filed an amended excess profits tax return for the year 1943 to which was attached the following statement:

"By filing these amended returns and paying the tax shown thereon, and interest computed thereon, taxpayer does not intend and shall not be deemed to waive any claims it may have which would result in a reduction of such tax and/or interest, or any portion thereof, nor any defenses to the assessment or collection of said taxes and/or interest, or any portion thereof, and taxpayer expressly reserves the right to file and prosecute claims for refund for all or any portion [6] of said tax or

interest, based on any and all available grounds, including the Statute of Limitations."

19. The Application for Relief under Section 722 (on Treasury Department Form 991) which had been filed for the year 1942 and which was referred to in the 1943 excess profits tax return of Plaintiff claimed a constructive average base period net income of $82,229.48. The excess profits credit based on the constructive average base period net income claimed by Plaintiff in said application is $78,118.00 and Plaintiff's excess profits tax liability for 1943 computed by using said credit instead of the actual excess profits credit is not less than $156,113.06. Based upon Plaintiff's Application for Relief under Section 722 which had been filed for the year 1942, Plaintiff was entitled to deferment of 1943 excess profits tax of not in excess of $12,793.45.

20. The Application for Relief under Section 722 (on Treasury Department Form 991) which was filed for the year 1943 on or about March 9, 1946, claimed a constructive average base period net income of $90,201.74. The excess profits credit based on the constructive average base period net income claimed by Plaintiff in said application is $85,691.65 and Plaintiff's excess profits tax liability for 1943 computed by using said credit instead of the actual excess profits credit is not less than $149,386.77. Based upon Plaintiff's Application for Relief under Section 722 which was filed for the year 1943,

Plaintiff was entitled to deferment of 1943 excess profits tax of not in excess of $15,013.13.

21. The entire amout of Plaintiff's excess profits tax for the year 1943 remaining unpaid as of July 1, 1949, to wit $58,089.75, did not constitute an amount of tax [7] remaining unpaid pursuant to Section 710(a)(5) of the Internal Revenue Code, [26 U. S. C. Section 710(a)(5)] but, on the contrary, constituted a portion of the amount of tax shown by the taxpayer to be payable on Plaintiff's 1943 excess profits tax return. Such amount together with interest in the sum of $20,040.96 was assessed and paid after the expiration of the period of limitation properly applicable thereto [26 U. S. C. 275(a) and 26 U. S. C. 276(b)] and constituted an overpayment to the refund to which Plaintiff is entitled, together with interest thereon from December 14, 1949, the date of payment. Said payment further constitutes a payment of internal revenue taxes which have been erroneously and illegally assessed and collected. No part of said amount or amounts has heretofore been paid or credited to Plaintiff.

Wherefore, Plaintiff demands judgment against defendant in the sum of $78,130.71, with interest thereon allowable under the statute, together with the costs and disbursements of this action.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
A member of the firm.

CROSSLAND & CROSSLAND,

By /s/ WILLIAM C. CROSSLAND,
A member of the firm.
Attorneys for Plaintiff.

Duly authorized.

[Endorsed]: Filed May 1, 1952. [8]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant United States of America and by way of answer to the complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the complaint.

II.

Admits the allegations contained in Paragraph II of the complaint.

III.

Admits the allegations contained in Paragraph III of the complaint.

IV.

Denies the allegations contained in Paragraph IV of the complaint, except it is admitted that plaintiff filed its excess profits tax [32] return for the year 1943 with the Collector of Internal Revenue for the First Collection District of California; said return showed a total excess profits tax of $193,238.42 and

a deferment under Section 710(a)-5 "in accordance with claim on file 1942" of $63,768.68. The total tax due on said return was $129,469.74.

V.

Denies the allegations contained in Paragraph V of the Complaint, except it is admitted that as a result of audit the total excess profits liability for said year was determined to be $194,881.09, of which $64,310.76 was deferred by reason of application of Section 710(a)-5 of the Internal Revenue Code, making the total assessable excess profits tax for said year $130,570.33.

VI.

Denies the allegations contained in Paragraph VI of the Complaint, except it is admitted that plaintiff made the following payments, totaling $129,469.74: March 15, 1944, $32,367.44; June 15, 1944, $32,-367.44; September 15, 1944, $32,367.44; and December 14, 1944, $32.367.42.

VII.

Denies the allegations contained in Paragraph VII of the Complaint, except it is admitted that in addition to the payments mentioned in Paragraph VI of this Answer, the sum of $1261.96, including interest of $271.43, was paid to the Collector of Internal Revenue for the First District of California for 1943 excess profits tax on Setember 13, 1948.

VIII.

Admits the allegations contained in Paragraph VIII.

IX.

Denies the allegations contained in Paragraph IX of the Complaint, except that it is admitted that on December 23, 1949, plaintiff filed a claim for refund of 1943 excess profits tax in the sum of $78,130.71 of which Exhibit A to the Complaint appears to be a copy. All the allegations contained in said exhibit are denied, except to the extent [33] otherwise expressly admitted in this answer.

X.

Admits the allegations contained in Paragraph X of the Complaint.

XI.

Admits the allegations contained in Paragraph XI of the Complaint.

XII.

Admits the allegations of fact of Paragraph XII of the Complaint, except it is alleged that plaintiff paid the total sum of $129,469.74; denies all conclusions of law in said Paragraph XII, and does not admit or deny the exhibits for the reason that they are conclusions of law.

XIII.

Denies the allegations contained in Paragraph XIII of the Complaint, except it is alleged that plaintiff filed a claim on Form 991 for relief under Section 722 of the Internal Revenue Code for the year 1943 on March 12, 1946.

XIV.

Denies the allegations contained in Paragraph XIV of the Complaint, except it is admitted that Form 991 was not filed with the excess profits tax return for the year 1943.

XV.

Denies the allegations contained in Paragraph XV of the Complaint.

XVI.

Denies the allegations contained in Paragraph XVI of the Complaint, except it is admitted that on December 2, 1946, plaintiff executed Form 872 extending the time within which income or excess profits tax for the year 1943 could be assessed to June 30, 1948, and on April 16, 1948, executed Form 872 extending the time for assessment of income and excess profits tax for the year 1943 to June 30, [34] 1949.

XVII.

Denies the allegations contained in Paragraph XVII of the Complaint, except it is admitted that the Commissioner of Internal Revenue assessed excess profits tax against plaintiff on the following dates and in the amounts shown: May 23, 1944, $129,469.74; and August 20, 1948, $1,100.59.

XVIII.

Denies the allegations contained in Paragraph XVIII of the Complaint, except it is admitted that on December 14, 1949, plaintiff filed an amended excess profits tax return for the year 1943.

XIX.

Denies the allegations contained in Paragraph XIX of the Complaint.

XX.

Denies the allegations contained in Paragraph XX of the Complaint.

XXI.

Denies the allegations contained in Paragraph XXI of the Complaint.

Wherefore, having fully answered, defendant prays it be dismissed together with its costs expended.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys;

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue,

By /s/ FRANK W. MAHONEY,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 29, 1952. [35]

[Title of District Court and Cause.]

STIPULATION OF FACTS

Except where expressly set forth as an exception to the general terms of this stipulation, It Is Hereby Stipulated, that for purposes of this proceeding the statements set forth in this stipulation shall be accepted as facts without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to. The various Paragraph are labeled with headings purely for the convenience of court and counsel in relating the parts of the stipulation to each other and no evidentiary weight or effect is to be attributed thereto. [46]

Paragraph I.

Suit Involves World War II Excess Profits Tax

The tax liability referred to in this stipulation is the liability arising under Subchapter "E" of Chapter 2 of the 1939 Revenue Code, as said 1939 Code was from time to time amended, which shall hereinafter be called the "excess profits tax."

Paragraph II.

Circumstances of the Tax Liability in Issue Part 1, the E. P. T. Return

(A) On March 15, 1944, the Plaintiff filed his original excess profits tax return for the taxable

year 1943 with the Collector of Internal Revenue for the First District of California. The return was filed on a Treasury Form 1121. A true and correct copy of this return has been introduced into evidence as Joint Exhibit "1-A."

(B) The total excess profits tax liability shown upon such return was $193,238.42, the amount entered on Line 16, Page 1, of the Form 1121. The tax payable shown upon such return was $129,469.74, the amount entered on Line 24, Page 1. The amount $129,469.74 was the total excess profits tax liability reduced by the amount $63,768.68 which was shown opposite line 17 together with the following statement: "In accordance claim on file 1942." Line 17 of Form 1121 bore the caption "amount deferred by reason of application of Section 710(a)(5) (relating to abnormality under Section 722) (attach Schedule)."

(C) Plaintiff's entire liability for the $129,469.74 tax payable shown upon the return was assessed and collected before July 1, 1949. In addition, certain miscellaneous amounts were assessed and collected as a result of adjustments suggested [47] by Revenue Agents with respect to the $129,469.74 amount. No assessment, collection or notice of deficiency was made at any time prior to July 1, 1949, with respect to Plaintiff's liability for the $63,768.68 subtracted from the tax payable as described in subparagraph II, B. A summary of all assessments and collections with regard to Plaintiff's 1943 ex-

cess profits tax liability has been introduced into evidence as Joint Exhibit "2-B."

(D) The payment on December 14, 1949, described in Paragraph VIII was made upon Plaintiff's liability for the $63,768.68, subtracted from tax payable as described in subparagraph II, B.

(E) No application on Form 991 for relief under Sec. 722 of the 1939 Revenue Code was attached to or filed with Plaintiff's excess profits tax return.

(F) An application for relief under Sec. 722 for the taxable year 1942 had been filed on Form 991 on September 15, 1943, and that application is the one referred to by the notation "in accordance claim on file 1942." The factual circumstances of this application are set forth in Paragraph III.

(G) An application for relief under Sec. 722 for the taxable year 1943 was first filed on Form 991 on March 12, 1946. The factual circumstances of this application are set forth in Paragraph IV.

(H) There were no schedules or statements on the original E. P. T. return for 1943, or on any material filed with said E. P. T. return disclosing:

(1) Computation in support of the amount entered on line 17 of Form 1121;

(2) Grounds for relief, or facts in support of grounds for relief, under Sec. 722;

(3) A constructive average base period net income [48] or facts in support of a constructive average base period net income;

(4) The amount of tax reduction claimed by use of Sec. 722.

(I) There was no disclosure of the percentage relationship between the adjusted excess profits net income (without consideration of Sec. 722) and the normal tax net income (without consideration of Sec. 26(e)) on the original E. P. T. return itself or on any material attached to or filed with the return.

Paragraph III.

Circumstances of the Tax Liability in Issue
Part 2, Form 991 for Taxable Year 1942

(A) The application for relief under Sec. 722 of the 1939 Revenue Code for the taxable year 1942 was filed on or about September 15, 1943, using Form 991 and was on file at the time Plaintiff filed its excess profits tax return for 1943 and was the Application referred to by the notation "in accordance claim on file 1942" made upon the return. A true and correct copy of the relevant portions of this application for relief has been introduced into evidence as Joint Exhibit "3-C."

(B) The amounts and calculations appearing on page 1 of said application as part of the computation of an amount deferred under Sec. 710(a)(5) of the 1939 Revenue Code and the amounts and calculations appearing on page 1 as part of the computation of the reduction of tax under Sec. 722 related to the taxable year 1942. The amounts and calculations appearing on page 2 as part of the com-

putation of a constructive average base period net income could relate to other taxable years.

(C) The application for relief under Sec. 722 for the taxable year 1942 claimed a constructive average base period net income of $82,229.48. The hypothetical computation of a deferment under Sec. 710(a)(5) using this amount and a total [49] excess profits tax liability (before benefit of Sec. 722) of $193,238.42 would result in a reduction under Sec. 722 of $38,768.03 and a deferment of $12,793.45.

Paragraph IV.

Circumstances of the Tax Liability in Issue
Part 3, Form 991, Filed in 1946

(A) On or about March 12, 1946, the Plaintiff filed an application for relief under Sec. 722 of the 1939 Revenue Code with respect to the taxable year 1943 using Form 991 (revised January, 1943). A true and correct copy of the relevant portions of this application for relief has been introduced into evidence as Joint Exhibit "4-D."

(B) As part of the computation and amounts shown, said application for relief set forth the following material on page 1 thereof:

Application for Relief Under Section 722
of the Internal Revenue Code

(Intermediate Items Omitted.)

8. Reduction in tax under Section 722
(line 6 minus line 7).....$ 45,494.32

(Intermediate Items Omitted.)

12.	If line 11 exceeds 50 per cent, amount of tax deferred under Section 710 (a) (5) (33 per cent of line 8) (enter as item 17, page 1, Form 1121)	$ 63,768.68
13	Total net relief claimed with respect to tax shown on return (line 8 minue line 12).....	$(16,274.36)
14.	Total excess profits tax for the taxable year paid at or prior to time this application is filed	$ 129,469.74
15	Amount of refund or credit for which this application is a claim (see Instruction III).....	$ None

(C) It is a common and accepted practice in filling out Internal Revenue Service forms to note a negative amount by showing the amount bracketed by parenthesis, wherefore the amount $16,274.36, shown as item 13 in the excerpt set forth in subparagraph (B) above, represents a negative amount.

(D) Plaintiff claimed a constructive average base period net income of $90,201.74 in this application for relief, and a reduction in taxes under Sec. 722 of $45,494.32. The hypothetical computation of a deferment under Sec. 710(a)(5) of the 1939 Revenue Code using the amount of $45,494.32 would result in a deferment of $15.013.13.

Paragraph V.

Circumstances of the Tax Liability in Issue
Part 3, Error in Computation

Subparagraph (A) Excepted from General Terms of Stipulation. The following subparagraph (a) may be introduced as evidence on the following basis and none other: to wit, for the convenience of the Plaintiff in presenting its case with the express reservation that the defendant is not bound thereby.

(A) The following table sets forth all the arithmetic steps necessary to compute the amount of tax that can be deferred under Sec. 710(a)(5) of the 1939 Revenue Code: [51]

STEP	DESCRIPTION O ARITHMETIC STEP	Illustrative Example (see footnote)
STARTING POINT	THE CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME IS THE STARTING POINT.	$100,000
STEP 1	COMPUTE THE EXCESS PROFITS CREDIT BASED ON THE CONSTRUCTIVE AVERAGE BASE PERIOD NET INCOME.	
	i Constructive average base period net income	$100,000
	ii Multiply..by .95 (statutory factor)	x .95
	iii Excess profits credit based on the constructive average base period net income	$ 95,000
STEP 2	COMPUTE THE ADJUSTED EXCESS PROFITS NET INCOME UNDER SEC.722.	
	i Excess profits net income	$300,000
	ii Subtract..$5,000 statutory exemption	-5,000
	iii Subtract..excess profits credit based on constructive average base period net income	-95,000
	iv Adjusted excess profits net income under Sec. 722	$200,000
STEP 3	COMPUTE EXCESS PROFITS TAX UNDER SEC. 722.	
	i Adjusted excess profits net income under Sec. 722	$200,000
	ii Multiply..by .90 (90% statutory tax rate)	x .90
	III Excess profits tax computed under Sec. 722	$180,000
STEP 4	COMPUTE THE AMOUNT OF REDUCTION CLAIMED UNDER SEC. 722.	
	i Excess profits tax computed without the benefit of Sec. 722 (From E.P.T. Return)	$210,000
	ii Subtract..e.p.t. computed under Sec. 722	-180,000
	iii Amount of tax reduction claimed under Sec. 722	$ 30,000
STEP 5	COMPUTE THE AMOUNT OF DEFERMENT THAT MAY BE CLAIMED UNDER SEC. 710(a)(5).	
	i Amount of tax reduction claimed under Sec. 722	$ 30,000
	ii Multiply..by statutory factor .33	x .33
	iii Amount of deferment that may be claimed under Sec. 710(a)(5)	$ 9,900

Footnote - The amounts used in this example were chosen for convenience in illustrating the calculations. They are not intended to affect or represent the amounts involved in this action.

LE, THOMAS, SNELL, NIGON & RUSSELL
TTORNEYS AT LAW
NELM BUILDING
RESNO 1, CALIF.

(B) The proper method of computing an amount to be entered as Item 17, Page 1 of Form 1121, would be to compute such amount as 33% of the amount of reduction of taxes claimed under Section 722 of the 1939 Revenue Code. Such reduction of taxes would be shown as Item 8, Page 1 of Form 991.

(C) The amount $63,768.68 entered as Item 17, Page 1 of Form 1121 filed as Plaintiff's E. P. T. return, was computed as 33% of the total excess profits tax entered as Item 16, Page 1 of Form 1121. Plaintiff erred in its method of computation.

Paragraph VI.

Events Relating to a General (3 Year) Statute of Limitations

(A) The Plaintiff duly filed his original excess profits tax return for the taxable year 1943 with the Collector of Internal Revenue for the First District of California on or before March 15, 1944. A true and correct copy of this return has been introduced into evidence as Joint Exhibit "1-A."

(B) The Plaintiff and the Commissioner of Internal Revenue entered into an agreement under Sec. 276(b) of the 1939 Revenue Code on Form 872 consenting in writing that the Plaintiff's excess profits liability for the taxable year 1943 may be assessed at any time on or before June 30, 1948. This agreement was signed by the Plaintiff on December 2, 1946, and signed by the Commissioner on

December 6, 1946. A true and correct copy of the agreement has been introduced into evidence as Joint Exhibit "5-E."

(C) The Plaintiff and the Commissioner of Internal Revenue entered into a subsequent agreement under Sec. 276(b) on Form 872 consenting in writing that the Plaintiff's excess profits tax liability for the taxable year 1943 may be assessed at any time on or before June 30, 1949. This agreement was [53] signed by the Plaintiff on April 16, 1948, and by the Commissioner on April 27, 1948. A true and correct copy of the agreement has been introduced into evidence as Joint Exhibit "6-F."

(D) No other agreement or agreements on Form 872 were executed regarding the Plaintiff's excess profits tax liability for the taxable year 1943.

Paragraph VII.

Events Relating to a Special Statute of Limitations Found in Sec. 710(A)(5) as Amended by Sec. 3 of PL 635, 6-12-48

Subparagraphs (A) Through (I) Excepted from General Terms of Stipulation. The following subparagraphs (A) through (I) may be introduced as evidence for the sole purpose and upon only the following issues and none other, to wit: (1) whether or not the Commissioner of Internal Revenue knew of the fact that the taxpayer failed to follow his regulations relating to applications for deferment under Sec. 710(a)(5) of the 1939 Revenue Code;

(2) whether or not the Commissioner by his actions intended to waive the regulations to the extent that the taxpayer failed to follow said regulations. The parties stipulate and agree that the court shall not consider any of the matters or alleged facts contained in subparagraphs (A) through (I) as evidence or proof of the accuracy or truth of such matters or facts, except as they bear on said issues.

(A) The Defendant mailed to the Plaintiff on May 25, 1948, a Revenue Agent's report together with a letter on Form 1200 commonly known as a "30-day letter" in connection with the audit examination of Plaintiff's income tax returns for the years 1942, 1943, and 1944. Said Revenue Agent had custody of the Plaintiff's complete original 1942, 1943, and 1944 returns at the time of said audit examination. As part of the computation of excess profits tax for the year 1942, said Revenue Agent's report set forth the following material on page 4 thereof: [54]

Schedule No. 5
Computation of Excess Profits Tax

Excess profits net income, from Schedule No. 4		$137,336.93
(Intermediate Items Omitted.)		
Excess profits tax: Above balance, or 90% of adjusted excess profits net income whichever is the lesser amount		94,492.49
Amount deferred by reason of application Sec. 710 (a) (5)		31,182.52
Total excess profits tax assessable		$ 63,309.97

As part of the computation of excess profits tax for the year 1943, said Revenue Agent's Report set forth the following material on page 11 thereof:

Schedule No. 13
Computation of Excess Profits Tax

Excess profits net income, from Schedule No. 11	$256,873.37
(Intermediate Items Omitted.)	
Excess profits tax:	
Above balance, or 90% of adjusted excess profits net income, whichever is the lesser amount	$194,881.09
Amount deferred by reason of application of Sec. 710(a) (5)	64,310.76
Excess profits tax	$130,570.33
Total excess profits tax assessable	$130,570.33

(B) The defendants mailed to the Plaintiff on January 14, 1949, a Revenue Agent's report (together with a letter on Form 892), in connection with the field audit examination of Plaintiff's income tax returns for the years 1945 and 1946 dated December 9, 1948, which as a part of the computations of adjustments to the surplus account as of 1/1/45 set forth the following material on page 14 thereof: [55]

Exhibit C
Adjustments to Surplus

Surplus return (Form 1120), 1/1/45		$ 218,507.94
(Intermediate Items Omitted.)		
Deduct—Additional taxes—		
Franchise tax, 1943	$ 55.34	
Franchise tax, 1944	79.64	
Income taxes, 1943 & 1944	1,280.73	
D.V.E.P. Taxes '42-43 & '44	1,346.27	
E.P.T. 1942-43 & '44	13,061.83	$(15,823.81)

Tax deferred under Sec. 710(a) (5) per books	$94,619.68	
As adjusted by prior R.A.B.	95,493.28	(873.60)
Surplus, as adjusted, 1/1/45		$ 267,980.61

(C) The Defendant's administrative file in connection with the field audit and examination of Plaintiff's 1945 and 1946 returns contained a memo dated December 9, 1948, signed by Barry O. Stuart, the Revenue Agent who made the field audit examination of said returns. The following item starts at page T-2 of said memo:

"The provisions of Section 102 were discussed with Mr. Luttermoser, full-time accountant for firm, and he was advised that the dividend rate should be upped considerably if earnings continued high. It was stated the government bonds in amount of $112,000.00 were obtained to hold as a reserve in the event the company was unsuccessful in prosecuting its claims under Section 722 and was required to pay the excess profits tax deferred under Section 710(a)(5) of approximately $96,000.00."

This memo was never at any time communicated to the Plaintiff. [56]

(D) By letter dated December 1, 1949, commonly known as a special 30-day letter, which enclosed a copy of a Section 722 report dated November 4, 1949, the Internal Revenue Agent in Charge, San Francisco, California, informed the Plaintiff that a constructive average base period

No credit was given in this statement to the $55,989.09 excess profits tax voluntarily paid by taxpayer on December 14, 1949. It was pointed out in this statement that the average income credit of $27,345.28 claimed in the original return for 1943 was not changed to the constructive average base period income of $32,958.62, for the reason that it would have resulted in a greater deficiency due to the 80 per cent limitation provided [58] in Code Section 710(a)(1)(B) in computing the tax.

(G) On May 11, 1950, a statutory notice in the form of a 90-day letter was sent to Plaintiff disclosing defiiciencies and overassessments previously determined for years 1941, 1942, 1943 and 1945, resulting from the determination of the Excess Profits Tax Council, including excess profits tax deficiency of $64,310.76 for 1943. It was stated therein that the claim for relief under Section 722 for the year 1943 was denied in full, and it was also stated that the deficiency resulted because of the deferment of a portion of the tax liability under Section 710(a)(5). It was further stated therein that the notices of deficiencies and allowances of relief under Sec. 722 given thereunder were given in accordance with the provisions of Sec. 272 and 732 of the Internal Revenue Code.

(H) By letter of September 27, 1950, the Internal Revenue Agent in Charge, San Francisco, was informed by the Deputy Commissioner of Internal Revenue that assessment of deficiency of

$55,989.09 on the amended excess profits tax return for 1943 filed December 14, 1949, reduced the excess profits tax deficiency for that year of $64,310.76 (per 90-day letter) to $8,321.67. A Certificate of Assessment and Payments dated July 8, 1952, states that $8,321.67 was assessed with interest in November, 1950, all of which was offset by various credits. This letter was never at any time communicated to the Plaintiff.

(I) In the statement attached to the Internal Revenue Agent in Charge's letter of April 6, 1950, to the Plaintiff, commonly known as a 15-day letter, the Plaintiff's refund claim for the year ending December 31, 1943, filed on December 23, 1949, was considered. In connection therewith, the Internal Revenue Agent in Charge, at page 2 of the statement, said the following: [59]

"A deficiency in excess profits tax in the amount of $64,310.76 for the year ended December 31, 1943, is disclosed by this statement. It is held that this deficiency is due to the deferment allowed pending the settlement of the Section 722 issue and that in accordance with the provisions of Section 710(a)(5) of the Internal Revenue Code, such deficiency may be assessed any time before the expiration of one year after the final determination of tax under Section 722. It is therefore recommended that your claim for refund be disallowed in full."

Paragraph VIII.
The Alleged Overpayment

(A) In order to stop any accumulation of interest with respect to the tax liability in issue, Plaintiff made a payment of $78,130.71 to the Collector of Internal Revenue for the first district of California on December 14, 1949, with respect to the 1943 E. P. T. This was in partial payment of the tax and interest upon Plaintiff's tax liability for the $63,768.68 subtracted from taxes payable as described in subparagraph II, B. $58,089.75 of said payment consisted of excess profits taxes and $20,040.96 consisted of interest thereon.

(B) Said $78,130.71 payment was mailed to the Collector of Internal Revenue together with an unsigned amended excess profits tax return for the taxable year 1943 containing the following statement:

"By filing these amended returns and paying the tax shown thereon, and interest computed thereon, taxpayer does not intend and shall not be deemed to waive any claim it may have which would result [60] in a reduction of such tax and/or interest or any portion thereof, nor any defenses to the assement or collection of said taxes and/or interest, or any portion thereof, and taxpayer expressly reserves the right to file and prosecute claims for refund of all or any portion of said payments, based on any and all available grounds, including the Statute of Limitations."

(C) No amount of the alleged overpayment described in subparagraph VIII, A, has been refunded or otherwise returned to the Plaintiff.

Paragraph IX.
Adminstrative Claim for Refund

(A) A claim for refund for the $78,130.71, "alleged overpayment" described in paragraph VIII was duly filed with the Collector of Internal Revenue for the First District of California on December 23, 1949, nine days after the payment of the tax. A true and correct copy of this claim has been introduced into evidence as Joint Exhibit "7-G."

(B) This claim was filed on a Form 843, and all statements contained therein were made under oath. It related to refunds with respect to a single taxable year, 1943.

(C) The alleged ground or grounds upon which the refund was claimed were set forth in detail. For a full disclosure of these alleged grounds, see the true and correct copy of this claim for refund introduced into evidence as Joint Exhibit "7-G."

(D) Sufficient facts to apprise the Commissioner of the exact basis of the claim were set forth. For a full disclosure of these facts, see the true and correct copy of this claim introduced into evidence as Joint Exhibit "7-G." [61]

(E) This claim was rejected by the Commissioner of Internal Revenue on or after May 11,

1950, and the Plaintiff was notified of such rejection by registered mail on or after May 11, 1950.

Paragraph X.

Facts Re: Courts Jurisdiction and Venue

(A) The Plaintiff, Sunland Industries, Inc., is and at all times material hereto has been a corporation duly organized and existing under the laws of the State of California, with its principal office and place of business at Fresno, Fresno County, California.

(B) The alleged overpayment described in Paragraph VIII was paid to the Collector of Internal Revenue for the First District of California while that office was held by James G. Smyth. James G. Smyth began to hold such office on or about the 14th day of May, 1945, and continued to hold such office until on or about the 27th day of September, 1951, at which time he was removed from office.

(C) Harold A. Berliner became the duly appointed and qualified Collector of Internal Revenue for the First District of California on or about the first day of January, 1943. He continued to hold this office until on or about March 31, 1945, at which time he ceased to hold this office.

Dated: This 5th day of January, 1956.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division,

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

KIMBLE, THOMAS, SNELL, JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1956. [62]

[Title of District Court and Cause.]

MINUTES OF THE COURT
JAN. 5, 1956

Present: Hon. Ernest A. Tolin, District Judge.

Counsel for Plaintiff: Michael F. Oglo.

Counsel for Defendant: Edward R. McHale, Ass't U. S. Att'y.

Proceedings:

For trial. Court convenes herein, this being the time regularly set for trial of this action. All parties are present in counrt and announce they are ready to proceed.

Attorney for plaintiff makes opening statement.

Attorney for defendant makes opening statement.

Plf's & Deft's Joint Exhibits:

1-A (U. S. Corp. excess profit tax return for year 1943),

2-B (Summary of assessments and collections with respect to Plaintiff's 1943 excess profits tax liability),

3-C (Application for relief under section 722 of the Internal Revenue Code),

4-D (Application for relief under section 722 of the Internal Revenue Code),

5-E (Consent fixing period of limitation upon assessment of Income and Profits Tax),

6-F (Consent fixing period of limitation upon assessment of Income and Profits Tax),

7-G (Claim), and stipulation of facts

are admitted in evidence.

Filed stipulation of facts by respective counsel.
Plaintiffs rest.
No evidence is offered by defendant.
Defendant rests.

It Is Ordered that cause be submitted on briefs, plaintiff to file opening brief in thirty days, defendant to file answer thirty days thereafter, and plaintiff to file closing brief twenty days after defendant files its answer; the cause then to stand Submitted upon filing of final brief.

JOHN A. CHILDRESS,
Clerk. [63]

March 23, 1956.

Kimble, Thomas, Snell, Jamison & Russell
1001 Helm Building
Fresno, California

Crossland & Crossland
Brix Building
Fresno, California

Mr. Edward McHale
Assistant U. S. Attorney
600 Federal Building
Los Angeles, California

Re: Sunland Industries, Inc., vs.
United States of America,
Case No. 1162-ND Civil

Gentlemen:

The above-entitled matter having been taken under submission after trial and upon filing of briefs, Judge Tolin directed the entry of the following order this date:

"The Court finds assessments and collection of taxes was within the period of limitations, therefore the plaintiff take nothing and defendant have judgment dismissing the complaint and for its costs."

Counsel for the defendant will please prepare the formal order for dismissal.

Very truly yours,

JOHN A. CHILDRESS,
Clerk,

By WM. A. WHITE,
Deputy Clerk.

cc: Elbie Eiland
Dep. Clk, Fresno [163]

[Title of District Court and Cause.]

DEFENDANT'S BRIEF

* * *

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY BRIEF

* * *

Argument

I. Arguments Raised in Defendant's Brief Are Based upon Waiver and Estoppel Theories Which Have Not Been Affirmatively Pleaded. Under F.R.C.P. 8(c) These Arguments and the Related Proposed Findings of Facts Cannot Be Considered by the Court and Any Evidence Related to These Theories Must Be Excluded.

The right to object to the materiality and relevancy of any evidence has ben expressly reserved. It was agreed between the parties and the court that attention would be called to these matters in the briefs. (See Reporter's Transcription of proceedings January 5, 1956, page 5, et seq.) Material arguments in the defendant's brief are clearly based upon waiver and estoppel, which should have been affirmatively pleaded under F.R.C.P. 8(c). These matters were in no way developed in the pleading stage of this proceeding. Accordingly, the Plaintiff hereby objects to the introduction into evidence of those facts found in Paragraph VII of the stipulation upon the grounds that said facts are immaterial and irrelevant to this proceeding in that said facts bear solely upon matters constituting an avoidance or affirmative defense which has not been pleaded as required under F.R.C.P. 8(c). [166]

* * *

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

Certificate of Service attached.

[Endorsed]: Filed March 27, 1956. [177]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the Court to set aside the following order made March 23, 1956:

> "The Court finds assessments and collection of taxes was within the period of limitations, therefore the plaintiff take nothing and defendant have judgment dismissing the complaint and for its costs."

and to grant plaintiff a new trial on the grounds that:

1. The Court erred in deciding the case before the case had been submitted. At page 17, line 20, of the Reporter's Transcript the Court stated that the case would be deemed submitted at the time the closing brief is in. At line 22, page 10, through line 1, page 11, of the Reporter's Transcript, it was [181] agreed that plaintiff would submit the opening brief within 30 days, defendant would submit defendant's answering brief within the next 30 days and plaintiff would submit the reply brief within the next 20 days.

Defendant's answering brief was filed March 7, 1956, and plaintiff's reply brief was therefore not due before March 27, 1956.

2. The plaintiff was prejudicially affected by the failure of the Court to await filing of the reply brief and considering of it because, pursuant to the stipulation of counsel (lines 2 through 13, page 4,

Reporter's Transcript), objections were made in the reply brief and the effect of the premature decision is to avoid the necessity for ruling upon these objections. The plaintiff is prejudicially affected because the objections of plaintiff in this regard go to the question of whether the defense presented by defendant is even properly before the Court. A copy of Plaintiff's Reply Brief is attached hereto in support of this ground. The original of said brief is being filed herewith.

3. The judgment is contrary to law in that it is unsupported by the evidence properly before the Court.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed March 27, 1956. [182]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 23, 1956

Present: Hon. Ernest A. Tolin, District Judge.
Counsel for Plaintiff: No Appearance.
Counsel for Defendant: No Appearance.

Proceedings:

This matter having been taken under submission after trial and filing of briefs,

The Court Finds that assessments and collection of taxes was within the period of limitations, and that, therefore, plaintiff take nothing, and defendant have judgment dismissing the complaint, and for its costs.

Clerk notify counsel.

JOHN A. CHILDRESS,
Clerk. [183]

[Title of District Court and Cause.]

ORDER OVERRULING PLAINTIFF'S OBJECTION TO INTRODUCTION OF EVIDENCE

The Court, having duly considered the objections raised in plaintiff's Reply Brief to defendant's evidence, to wit, Paragraph VII of the Stipulation, and it appearing to the Court that said facts are material and releveant to the issues raised by both the pleadings and Paragraph VII of said Stipulation, it hereby rules as follows:

Plaintiff's objections are overruled and the facts stipulated in Paragraph VII are admitted into evidence for the purposes agreed upon in said paragraph.

Dated: This 16th day of April, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Presented by:

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division.

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

Lodged April 4, 1956.

[Endorsed]: Filed April 18, 1956. [184A]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Hereby Stipulated, that for purposes of this proceeding, it shall be accepted as a fact that no assessment of any portion of the amount of Plaintiff's excess profits tax for the year 1943 in excess of the sum of $130,570.33 was made prior to July 1, 1949; and it shall be accepted as a fact that no proceeding in court for the collection of any portion of the amount of Plaintiff's excess profits tax for the year 1943 in excess of the sum of $130,570.33 was begun or prosecuted prior to July 1, 1949.

Dated: This 1st day of May, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1956. [206]

United States District Court for the Southern District of California, Northern Division

No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above case came on for trial in the Northern Division of this Court at Fresno, California, on

January 5, 1956, the Hon. Ernest A. Tolin, United States District Judge, sitting without a jury, presiding, the plaintiff represented by its counsel, Kimble, Thomas, Snell, Jamison & Russell, by William N. Snell and Michael F. Oglo, Esqs., the defendant represented by its counsel, Laughlin E. Waters, United States Attorney for said District, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, and evidence and stipulations of fact having been received, and the Court having duly considered the same, the pleadings, and all the briefs and arguments of the parties, and having directed entry of judgment for defendant, now finds as follows: [211]

Findings of Fact

I.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office located in Fresno, California.

II.

The plaintiff filed its returns and kept its books on an accrual and calendar year basis. Its excess profits tax return for 1943, filed March 15, 1944, shows the following pertinent data:

(1)	Excess profits credit based on income	$ 27,345.28
(2)	Excess profits tax liability	193,238.42
(3)	Amount of item (2) deferred under § 710(a) (5)	63,768.68

(4) Net excess profits tax due (Joint Ex. 1-A) 129,469.74

The return shows the total excess profits tax liability to be $193,238.42. The total tax due on said return was $193,238.42.

III.

The net excess profits due per return was duly paid in installments. The amount shown in item (3) in the preceding paragraph, was deferred under § 710(a) (5) by reason of a claim for relief under § 722, relating to an excess profits credit based on a constructive average base period net income. On the line of the return on which the amount deferred was entered, opposite the caption "Amount deferred by reason of application of Section 710(a) (5) (relating to abnormality under Section 722) (attach schedule)," the following statement was made: "In accordance with claim on file 1942."

IV.

An application for § 722 relief (Form 991) was not filed with the return. [212] A claim for relief under § 722 had been filed on Form 991 for 1942, however, on September 15, 1943, and that application claimed a constructive average base period net income of $82,229.48 and is the one referred to in the 1943 return. A Form 991 expressly for 1943 was not filed until March 12, 1946.

V.

On January 23, 1950, the Excess Profits Tax Council in effect disallowed the plaintiff's § 722

claim. Plaintiff was so informed by letter dated April 6, 1950, and was rendered a statement of over-assessments and deficiencies for various years including 1943.

VI.

A deficiency of $55,989.09 in excess profits tax for 1943, and interest of $19,316.23, was assessed on the January, 1950, list. This amount had been paid on December 14, 1949, in order to stop the running of interest, since the taxpayer had been advised that the Internal Revenue Agent in Charge, San Francisco, was recommending against allowance of its § 722 claim.

VII.

On December 23, 1949, plaintiff duly filed with the Collector of Internal Revenue for the First District of California, San Francisco, California, a claim for refund of the $78,130.71 payment made on December 14, 1949. The claim for refund was filed on Form 843 and in all respects complied with the regulations applicable thereto and set forth in full the grounds on which the claimant relied. This claim was rejected by the Commissioner of Internal Revenue and notice of rejection was given by registered mail May 11, 1950. No portion of said $78,-130.71 has been refunded or credited to plaintiff. This action was brought within the time provided in § 3772(2) of the Internal Revenue Code of [213] 1939.

VIII.

The plaintiff had filed consents extending to June 30, 1949, the time for assessment for 1943. The pay-

ment made by taxpayer on December 14, 1949, was accompanied by an unsigned amended return to which was attached a statement to the effect that that plaintiff did not waive its right to claim such payment was untimely.

IX.

The statutory notice of deficiencies or overassessments sent by the Commissioner to the taxpayer on April 6, 1950, is the final determination referred to in § 710(a) (5) of the Internal Revenue Code of 1939.

X.

By letter dated December 1, 1949, which enclosed a copy of a § 722 report (RAR dated November 4, 1949), the Internal Revenue Agent in Charge, San Francisco, California, informed the plaintiff that a constructive average base period net income of $32,-958.62 was being allowed for the taxable years ended December 31, 1941, 1942, 1943 and 1945. This represented a partial allowance of taxpayer's application for relief filed under provisions of Code § 722. It was stated in the same letter that, if taxpayer was in accord with this determination, it should promptly execute and forward the enclosed form of agreement in order that prompt review of the recommendation by the Excess Profits Tax Council could be made. Otherwise, it was given 30 days to file a protest to the Internal Revenue Agent in Charge. The letter further stated, "This letter is not a final notice of determination under § 732 of the Internal Revenue Code." The agreement form

was signed by the plaintiff on December 12, 1949, and was mailed to the Internal Revenue Agent in Charge on December 14, 1949, together with a letter of transmittal stating that the plaintiff did not waive thereby any claims with respect to the assessment or collection of such taxes, and was received by the Internal Revenue Agent in Charge. [214]

XI.

A recommended constructive average base period income of $32,958.62 was far less than the $82,229.48 claimed in the application (Form 991) filed for 1942, upon which was based the deferment of $63,768.68 of excess profits tax liability shown on the original return for 1943, or that claimed of $90,201.74 in the application for relief (Form 991) for 1943 filed on March 12, 1946. Excess profits credit based on average income used in the original 1943 return was $27,345.28, and the § 722 report did not change this to the recommended constructive average base period income of $32,958.62. This meant that any claim for relief under § 722 was denied in full for 1943.

XII.

The Commissioner of Internal Revenue was aware of the omission of the plaintiff in filing his 1943 excess profits tax return without the Form 991 attached. On the revenue agent's report, dated April 28, 1948, a copy of which was mailed to the taxpayer May 25, 1948, reference is made to the deferment of $64,310.76 for 1943 and $31,182.52 for 1942 (slight

variance from amounts deferred on return of $63,-768.68 and $30,851.00, respectively, due to corrected computations). The revenue agent's report dated December 9, 1948, which was mailed to the plaintiff on January 14, 1949, noted the deferments under § 710(a) (5). The administrative file of the Internal Revenue Service concerning the taxpayer contained a memorandum dated December 9, 1948, signed by the revenue agent who made the field audit of the return, which memorandum stated that the taxpayer stated to the agent that government bonds in the amount of $112,000.00 were obtained to hold as a reserve in the event the company was unsuccessful in prosecuting its claims under § 722 and was required to pay the excess profits tax deferred under § 710(a) (5) of approximately $96,000.00 ($64,310.76 plus $31,182.52). Both reports were [215] prepared some time prior to the expiration of time for assessing ordinary deficiencies, June 30, 1949.

XIII.

The Form 991 relied upon in the 1943 return was not filed until four months following the filing of the 1942 excess profits tax return on which a portion of the tax was also deferred under § 710(a) (5). In that instance, also, the Commissioner waived the requirements of his regulations by allowing taxpayer to defer a portion of its taxes.

XIV.

The Commissioner of Internal Revenue took notice of the fact that the taxpayer failed strictly

to follow his regulations, but by his actions he clearly waived the regulatory requirement of filing a Form 991 with the return and allowed the taxpayer the deferment for 1943. Such deferment obviously benefited the taxpayer and having accepted the benefit, it cannot be allowed to prevail here on the basis of a clear omission on its part.

XV.

Having waived the requirement of filing the Form 991 with the return, under the requirements of the Code § 710(a) (5), the Commissioner could assess the deferred tax any time before the expiration of one year after the final determination under § 722. The final determination was at the earliest on January 23, 1950, when the Excess Profits Tax Council approved the finding of the Internal Revenue Agent in Charge relating to the determination of the constructive average base period net income. The assessment and collection of the tax and interest herein questioned was before that date, hence timely, and the defendant is entitled to judgment that the plaintiff take nothing and for its costs.

XVI.

The reference to a Form 991 on file with the 1942 return in the 1943 return served to incorporate such form in the 1943 return. [216]

XVII.

The reference to the 1942 claim together with the taxpayer's own course of conduct served to mislead

the Commissioner to the extent that the taxpayer should not be allowed to take advantage of any error on the Commissioner's part.

XVIII.

Plaintiff paid sums aggregating $130,570.15 on its excess profits tax liability for 1943 prior to June 30, 1949. The remainder of plaintiff's excess profits tax liability for 1943 in the sum of $58,089.75, together with interest thereon in the sum of $20,040.96, was assessed and paid after June 30, 1949.

XIX.

Any conclusion of law herein which is deemed to be a fact is hereby found as a fact and incorporated herein as a finding of fact.

Conclusions of Law

From the foregoing facts, the Court concludes as follows:

I.

The Court has jurisdiction of this controversy and of the parties hereto.

II.

Plaintiff invoked the relief provisions contained in the World War II profits tax and by so doing put into effect the special statute of limitations under § 710(a) (5).

III.

The Commissioner of Internal Revenue properly waived certain requirements of the Treasury Regulations compelling the taxpayer to file with its re-

turn an application for relief on Form 991 and, therefore, the assessment of the taxes and interest in question was timely.

IV.

The plaintiff by referring to the 1942 claim on file and the [217] plaintiff's own course of conduct served to mislead the Commissioner to the extent that the plaintiff cannot be allowed to take advantage of any error on the Commissioner's part. A suit for refund is based on equitable principles and is in the nature of a suit for money had and received. The plaintiff cannot be permitted to found its claim upon his own inequity or to take advantage of its own wrong.

V.

The entire amount of the tax and interest assessed and collected was assessed and collected timely. Until the application for relief was considered in the regular fashion, the determination could not be made of an amount properly deferred.

VI.

Any finding of fact herein which is deemed to be a conclusion of law is hereby concluded as a matter of law and incorporated herein as a conclusion of law.

VII.

The assessment and collection of taxes and interest here in issue was within the period of limitations and the defendant timely and properly assessed and collected said taxes and interest from plaintiff.

VIII.

The defendant is entitled to judgment that the plaintiff take nothing, that the complaint be dismissed with prejudice and the defendant have its costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is ordered, adjudged and decreed:

That the plaintiff take nothing by its complaint; that the complaint may be and is dismissed with prejudice and that the defendant have judgment for and shall recover from plaintiff the [218] amount of its costs to be taxed by the Clerk of this Court in the sum of $20.00.

Dated: This 16th day of April, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Affidavit of service by mail attached.

Lodged April 4, 1956.

[Endorsed]: Filed April 18, 1956.

Docketed and entered April 19, 1956. [219]

[Title of District Court and Cause.]

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT FINDINGS OF FACT, CONCLUSIONS OF LAW

This cause came on to be heard upon motion of the plaintiff to amend and supplement findings of fact and conclusions of law, before the Court, the Hon. Ernest A. Tolin, United States District Judge, presiding, in the Northern Division at Fresno, California, on May 11, 1956, and the Court having considered the pleadings, evidence, motions, memoranda and arguments of counsel, hereby orders as follows:

(1) The deletion requested in part 4 of the Motion with respect to Finding No. IV is granted so that the following language is stricken from the first sentence of said Finding at lines 32, page 2, of the Findings, to wit:

> "nor within six months from the date prescribed for filing such a return, as required by § 722(b) of the Code."

A period is added after the word "return" so that the first sentence [221] of said Finding now reads:

> "An application for § 722 relief (Form 991) was not filed with the return."

The balance of said Finding No. IV is undisturbed.

(2) The amendment requested in part 6 of the Motion is granted to the extent of adding the word

"unsigned" to the second sentence of Finding No. VIII so that said sentence now reads as follows:

> "The payment made by taxpayer on December 14, 1949, was accompanied by an unsigned amended return to which was attached a statement to the effect that the plaintiff did not waive its right to claim such payment was untimely."

(3) Plaintiff's request number 7 to add additional language to Finding No. X is granted so that the last sentence of Finding No. X is now amended to read as follows:

> "The agreement form was signed by the plaintiff on December 12, 1949, was mailed to the Internal Revenue Agent in Charge on December 14, 1949, together with a letter of transmittal stating that the plaintiff did not waive thereby any claims with respect to the assessment or collection of such taxes, and was received by the Internal Revenue Agent in Charge."

All other requests to amend and supplement the Findings of Fact and Conclusions of Law may be, and are, hereby denied.

The Clerk is ordered to make the aforesaid changes by interlineation of the Findings of Fact heretofore executed by the Court and filed on April 18, 1956, and to present the Findings to the Court for initialing the changes.

Dated: This 1st day of June, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to form pursuant to Local Rule 7(a) this 29th day of May, 1956.

KIMBLE, THOMAS, SNELL, JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 1, 1956. [223]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This cause came on to be heard upon motion of plaintiff for a new trial, before the Court, the Hon. Ernest A. Tolin, United States District Judge, presiding, in the Northern Division, at Fresno, California, on May 11, 1956, and the Court having considered the files, the evidence, the motion, memoranda and argument of counsel, hereby orders that the motion of plaintiff for a new trial be, and is, denied.

Dated: This 1st day of June, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge.

Approved as to form pursuant to Local Rule 7(a) this 29th day of May, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 1, 1956. [224]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sunland Industries, Inc., a corporation, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 19, 1956. Motions under Rule 52(b) and Rule 59 were made in this action and orders denying said motions were entered on or after May 11, 1956.

Dated: This 6th day of July, 1956.

KIMBLE, THOMAS, SNELL,
JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Appellant, Sunland Industries, Inc., a Corporation.

[Endorsed]: Filed July 6, 1956. [225]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The Appellant designates the complete record and all the proceedings and evidence in the action to be contained in the record on appeal in this action. This is to include, all Reporter's Transcripts of the Proceedings which presumably have been filed with the Court inasmuch as the Plaintiff paid the fee for such transcripts. This is also to include all the Minutes of the Court.

Dated: This 6th day of July, 1956.

KIMBLE, THOMAS, SNELL, JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Appellant.

Certificate of service attached.

[Endorsed]: Filed July 6, 1956. [226]

JOINT EXHIBIT No. 1-A
(Admitted in evidence 1/5/56)

United States District Court for the Southern District of California, Northern Division
No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITER STATES OF AMERICA,
Defendant.

EXHIBIT TO STIPULATION

It Is Hereby Stipulated, that for the purpose of this proceeding the attached true and correct copy of the Plaintiff's Excess Profits Tax Return for the Taxable Year 1943 is the material referred to in the Stipulation of Facts as Joint Exhibit "1-A," and may be accepted as fact as though incorporated in full within the said Stipulation.

Dated: This 5th day of January, 1956.

KIMBEL, THOMAS, SNELL, JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney;
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

Attorneys for Defendant.

/s/ EDWARD R. McHALE,

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…ST-WAR CREDIT
…MADE IT:CT:CC-2
Form 1121
…Treasury Department
…Internal Revenue Service

874 — Page 1

1943

UNITED STATES CORPORATION EXCESS PROFITS TAX RETURN
For Calendar Year 1943

or fiscal year beginning ____, 1943, and ending ____, 1944

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

SUNLAND INDUSTRIES INC
(Name)
PO Box 1669
(Street and number)
FRESNO CALIF
(City or Town) (State)

Business group serial number entered on page 1, Form 1120

File Code 715
Serial No. 400824
District
Cash / Check / M.O.
First payment 32,367.44

Total 1100.59

AUG 20 1948

RECEIVED JAN 16 1950 SAN FRANCISCO

CLAIM REJECTED

EXCESS PROFITS TAX COMPUTATION

Item	Column 1 Income Credit Method	Column 2 Invested Capital Credit Method
1. Excess profits net income (Schedule …)	$ 254851 77	$ 254851 77
2. Specific exemption	5,000	5,000
3. Excess profits credit—based on income (line 46, Schedule …)	27345 28	x x x x x x x x
4. Excess profits credit—based on invested capital (line …)	x x x x x x x x	18917 36
5. Unused excess profits credit adjustment (attach schedule)		
6. Total of items 2 to 5	$ 32345 28	23917 36
7. Difference between item 1 and item 6	$ 222506 49	230934 41
8. Adjusted excess profits net income (item 7, column 1, or item 7, column 2, whichever is applicable)		$ 222506 49
9. … percent of item 8		$ 200255 84
10. Net income (computed without regard to the credit provided by section 26 (e)) (item 35, page 1, Form 1120)		$ 254851 77
11. Less: (a) Dividends received credit (85 percent of total of column 2, Schedule E, Form 1120 (excluding dividends received on certain preferred stock of a public utility), but not in excess of 85 percent of item 10 above)	$	
(b) Dividends paid on certain preferred stocks if taxpayer is a public utility (line 20, page 2, Form 1120)		
12. Surtax net income (computed without regard to the credit provided by section 26 (e))		$ 254851 77
13. … percent of item 12		203881 42
14. Income tax under Chapter 1 (other than section 102) for the taxable year (item 41, page 1, Form 1120)		10648 00
15. Excess of item 13 over item 14		$ 193233 42
16. Item 9, or item 15, whichever is lesser		$ 193233 42
17. Amount deferred by reason of the application of section 710 (a) (5) (relating to abnormality under section 722) (attach schedule)		$ 63768 68
18. Excess profits tax: (a) Item 16 minus item 17	$	
(b) If schedule is filed under question (g), page 2, amount of tax as computed in such schedule		
(c) Item 18 (a) or item 18 (b), whichever is applicable		$ 129464 74
19. Less: Credit for income taxes paid to a foreign country or United States possession allowed to a domestic corporation (portion not used in computing item 42, page 1, Form 1120)		
20. Item 18 (c) minus item 19		$ 129464 74
21. Less: Credit for debt retirement (item 28, below)		$
22. Item 20 minus item 21		$
23. Amount, if any, due to application of section 734 (adjustment in case of position inconsistent with prior income tax liability) (attach schedule)		$
24. Excess profits tax due (item 22 plus item 23, or item 22 minus item 23, whichever is applicable)		$ 129464 74

FILED

POST-WAR REFUND OF EXCESS PROFITS TAX AND CREDIT FOR DEBT RETIREMENT

Item		Amount
25. Balance of excess profits tax (item 18 (c), above)		$
26. Credit allowable under sections 780 and 781 (10 percent of item 25) (…instructions…)		$ 12946 47
27. Excess of amounts paid on indebtedness or net reduction in indebtedness under section 783 (b) (2)	$	none
28. Credit for debt retirement allowable under section 783 (40 percent of item 27, but not in excess of 10 percent of item 25)		
29. Net post-war refund credit (item 26 minus item 28)		$ 12,946 47

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 15th day of March, 1944.

T. P. Hanson (President or other principal officer) (Official title)

NOTARIAL SEAL — Claude B. Gordon (Signature of officer administering oath) (Title)

CORPORATE SEAL — M. E. Bird (Treasurer, Assistant Treasurer, or Chief Accounting Officer) (State title) Ast Secty

We swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 15th day of March, 1944.

C. E. Bradford (Signature of person preparing the return)

(Signature of person preparing the return)

NOTARIAL SEAL — Claude B. Gordon (Signature of officer administering oath) (Title)

(Name of firm or employer, if any)

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Page 3

QUESTIONS

(a) Date of incorporation ______ (b) State or country ______

(b) Collector's office in which your income tax return for the taxable year was filed ______

(c) Is this a consolidated return? ______ If so, procure from the collector Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of the consolidated income tax return.

(d) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on, reduced by the amount of amortizable bond premium under section 125 attributable to, all Government obligations described in section 22(b)(4) of the Internal Revenue Code? (Answer "yes" or "no") ______

(e) Are you a transferor or transferee upon an exchange as defined by section 760 or 761 of the Internal Revenue Code? (Answer "yes" or "no") ______

(f) Does this return involve an adjustment of the excess profits tax liability due to the application of the sections specified in (1) below? (Answer "yes" or "no") ______ If answer is "yes":

(1) Check the appropriate sections and submit schedules showing computation: 710(a)(4) ☐; 721 ☐; 726 ☐; 731 ☐; 735(b) ☐; 735(e) ☐; 736(a) ☐; 736(b) ☐. (See General Instructions E, F, G, H, and I.) (Enter amount of excess profits tax as Item 18 (b), page 1.)

(2) From the schedules submitted under (1) above, enter any tax adjustment which results from the application of each of the following sections: 721, $ ______; 726, $ ______; 731, $ ______

(3) From the schedules submitted under (1) above, enter any income adjustment which results from the application of each of the following sections: 721, $ ______; 731, $ ______; 735(b), $ ______; 735(e), $ ______

(g) State amount of total assets as of the end of the taxable year. (From Form 1120, page 4, line 8, last column), $ ______

Schedule A. EXCESS PROFITS NET INCOME COMPUTATION

Line No.		Column 1 Income Credit Method		Column 2 Invested Capital Credit Method	
1.	Normal-tax net income (computed without allowance of credit for income subject to excess profits tax and without allowance of dividends received credit) (item 27, page 1, Form 1120)	$ 25485	77 ✓	$ 25485	7[illegible]
2.	Net short-term capital gain (do not enter net short-term capital loss)				
3.	Adjustment to net operating loss deduction				
4.	Decrease in deductions limited by income				
5.	50 percent of interest on borrowed capital	x x x x x x x	x x		
6.	Interest on Government obligations (see question (d) above, for election)	x x x x x x x	x x		
7.	Total of lines 1 to 6	$		$	
8.	Net gain from sale or exchange of capital assets (item 12 (a), page 1, Form 1120)	$		$	
9.	Income from retirement or discharge of bonds, etc.				
10.	Refunds and interest on Agricultural Adjustment Act taxes				
11.	Recoveries of bad debts				
12.	Increase in deductions limited by income				
13.	(a) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign corporations)			x x x x x x x	x
	(b) Dividends received credit adjustment (item 13, page 1, Form 1120, excluding dividends received from foreign personal holding companies and dividends received on stock held primarily for sale to customers by a dealer in securities)	x x x x x x x	x x		
14.	Nontaxable income of certain industries with depletable resources				
15.	Total of lines 8 to 14	$		$	
16.	Excess profits tax net income computed without regard to deductions applicable to life insurance companies (line 7 minus line 15)	$		$	
17.	Deductions applicable to life insurance companies				
18.	Excess profits net income computed under income credit method or invested capital credit method (line 16, or line 16 minus line 17 in case of a life insurance company)	$ 25485	77 ✓	$	

16—20810-0

Item 33

1936	31020.19
1937	32655.74
1939	28434.50
	92110.43
1/3	30703.48
75%	23027.61
	2071.85
	21002.76

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Schedule B.—EXCESS PROFITS CREDIT—BASED ON INCOME

	Taxable Years Beginning After December 31, 1935, and Before January 1, 1940 (If additional columns are required, attach separate schedule)			
	1. Year Ended .... 19....	2. Year Ended .... 19....	3. Year Ended .... 19....	4. Year Ended .... 19....
Normal-tax (or special-class) net income	$	$	$	$
Net capital loss used in computing line 1				
Securities which are capital assets deducted in computing line 1 as bad debts or as stock determined to be worthless (for taxable years beginning prior to January 1, 1938)				
Net loss from sale or exchange of property other than capital assets deducted in computing line 1 (for taxable years beginning after December 31, 1937)				
Net loss from involuntary conversion of property deducted in computing line 1				
Total of lines 1 to 5	$	$	$	$
Net capital gain used in computing line 1	$	$	$	$
Net gain from sale or exchange of property other than capital assets used in computing line 1 (for taxable years beginning after December 31, 1937)				
Net gain from involuntary conversion of property used in computing line 1				
Total of lines 7 to 9	$	$	$	$
Difference between lines 6 and 10	$	$	$	$
Net gain from sale or exchange of capital assets after considering net capital loss carry-over				
Net gain from sale, exchange, or involuntary conversion of property other than capital assets				
Total of lines 11 to 13	$	$	$	$
Net loss from sale, exchange, or involuntary conversion of property other than capital assets	$	$	$	$
Stock and securities of affiliated corporations which became worthless during the taxable year (if included in line 2, 3, or 7)				
Total of lines 15 and 16	$	$	$	$
Normal-tax (or special-class) net income after applying section 711 (b) (2) (line 14 minus line 17)	$	$	$	$
Net short-term capital gain after considering net capital loss carry-over (do not enter net short-term capital loss)				
Dividends received credit				
Deductions on account of retirement or discharge of bonds, etc.				
Casualty, demolition, and similar losses not taken into account in computing line 12, 13, or 15				
Repayment of processing tax to vendee				
(a) Abnormal judgment liabilities, etc. (attach statement)				
(b) Abnormal expenditures for intangible drilling and development costs (attach statement)				
(c) Other abnormal deductions (attach statement)				
Capitalization of expenditures for advertising or promotion of goodwill (attach statement)				
Total of lines 18 to 25	$	$	$	$
Income from retirement or discharge of bonds, etc.	$	$	$	$
Dividends received from domestic corporations				
Net gain from sale or exchange of capital assets after considering net capital loss carry-over (line 12, above)				
Total of lines 27 to 29	$	$	$	$
Excess profits net income (line 26 minus line 30)	$ 31020.19	$ 32655.74	$ 2024.85	$ 28434.50

Net aggregate of columns 1, 2, 3, and 4		$ 94135.28
Increase in lowest year in base period (attach statement)		21002.76
Total of lines 32 and 33		$ 115138.04
Average base period net income—General average (line 34 divided by number of months in base period, multiplied by 12)		$ 28784.51
(Lines 36 to 42 for computation of average base period net income where there are increased earnings in last half of base period)		
Net aggregate of columns 3 and 4, line 31 (see instruction regarding limitation applicable to taxable year ending after May 31, 1940)	$	
Net aggregate of columns 1 and 2, line 31		
Excess of line 36 over line 37	$	
One-half of line 38		
Line 36 plus line 39	$	
Line 40 divided by number of months in second half of base period, multiplied by 12	$	
Average base period net income—Increased earnings in last half of base period (line 41, or the highest excess profits net income for any taxable year in the base period, whichever is lesser)		$ 28784.51
95 percent of line 35 or line 42, whichever is greater		$ 27345.28
Net capital addition, $........; or net capital deduction, $........ (attach statement).		
8 percent of line 44, if a net capital addition (or 6 percent of line 44, if a net capital reduction)		
Excess profits credit—based on income (line 43 plus line 45, if a net capital addition) (or line 43 minus line 45, if a net capital reduction)		$ 27345.28

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Schedule C.—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL

Line No.	Equity Invested Capital at the Beginning of the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)		
1.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital		$ 850.00
2.	Property paid in for stock or as paid-in surplus, or as a contribution to capital		44460
3.	Distributions of earnings and profits in stock of the corporation		116 08
4.	(a) Accumulated earnings and profits	$	
	(b) Adjustment for transferor's deficit under section 718 (c) (5)	$	
	(c) Increase or decrease under section 761 (d) (1) on account of intercorporate liquidation	$	
	(d) Accumulated earnings and profits (item 4 (a)) as adjusted by item 4 (b) and (c)		
5.	25 percent of new capital paid in during a taxable year beginning after December 31, 1940		
6.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
7.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
8.	Total of lines 1 to 7		$ 2345 59
9.	Less: Distributions made prior to the taxable year not out of accumulated earnings and profits	$	
10.	Earnings and profits of another corporation required to be deducted by section 718 (b) (3)		
11.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
12.	Deficit in earnings and profits in invested capital of another corporation (section 718 (b) (5)		
13.	Total of lines 9 to 12		
14.	Equity invested capital at beginning of taxable year (line 8 minus line 13)		$ 2345 59
	Average Addition to Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)		
15.	Money paid in for stock, or as paid-in surplus, or as a contribution to capital	$	
16.	Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
17.	Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 24, below)		
18.	25 percent of new capital		
19.	Increase on account of intercorporate liquidation under section 761 (d) (2)		
20.	Deficit in earnings and profits of another corporation under section 718 (a) (7)		
21.	Total additions in lines 15 to 20		
22.	Total of lines 14 and 21		$ 2345 59
	Average Reduction in Equity Invested Capital During the Taxable Year (See Instructions for Schedule C, lines 1 to 12, inclusive)		
23.	Distributions not out of earnings and profits of the taxable year	$	
24.	Stock distributions from accumulated earnings and profits at beginning of year (see line 17, above)		
25.	Decrease on account of intercorporate liquidation under section 761 (d) (2)		
26.	Deficit in earnings and profits included in invested capital of another corporation (section 718 (b) (5))		
27.	Total reductions in lines 23 to 26		
	(See Instructions for Schedule C, lines 28 to 41, inclusive)		
28.	Average equity invested capital (line 22 minus line 27)		$ 2345 59
29.	Average borrowed capital (attach schedule)	$	
30.	Average borrowed invested capital (50 percent of line 29)		
31.	Average invested capital (line 28 plus line 30)		$ 2345 59
32.	Total inadmissible assets	$ 2345 59	
33.	Total admissible and inadmissible assets	$	
34.	Percentage which line 32 is of line 33	3747 %	
35.	Reduction on account of inadmissible assets (.... percent of line 31)		9150
36.	Invested capital (line 31 minus line 35)		$ 2254 09
37.	Portion of line 36 (not in excess of $5,000,000); and credit at 8 percent	$	8% $ 180 72
38.	Portion of line 36 (over $5,000,000, but not over $10,000,000); and credit at 7 percent		7%
39.	Portion of line 36 (over $10,000,000, but not over $200,000,000); and credit at 6 percent		6%
40.	Portion of line 36 (over $200,000,000); and credit at 5 percent		5%
41.	Excess profits credit—based on invested capital (total of lines 37 to 40)		$ 180 72

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Summary of Assessments & Collections
With Respect to Plaintiff's
1943 Excess Profits Tax Liability

Table 1: Assessments Prior to 7-1-49. The following table sets forth all the assessments made prior to July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date of Assessment	Amount Assessed With Respect to Tax Liability Exclusive of Any Interest	Amount Assessed With Respect to Interest
May 23, 1944	$129,469.74	
Aug. 20, 1948	1,100.59	
Aug. 20, 1949		$217.64

Table 2: Collections Prior to 7-1-49. The following table sets forth all the collections made prior to July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date and Method of Collections	Amount Collected With Respect to Tax Liability Exclusive of Any Interest	Amount Collected With Respect to Interest
Mar. 15, 1944; timely payment by plaintiff	$32,367.44	
June 15, 1944; timely payment by plaintiff	32,367.44	
Sept. 15, 1944; timely payment by plaintiff	32,367.44	
Dec. 14, 1944; timely payment by plaintiff	32,367.44	
Sept. 13, 1948; voluntary payment by plaintiff	1,100.59	
Sept. 13, 1948; voluntary payment by plaintiff		$217.69

Table 3: Assessments after 7-1-49. The following table sets forth all the assessments made after July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date of Assessment	Amount Assessed With Respect to Tax Liability Exclusive of Any Interest	Amount Assessed With Respect to Interest
Jan. 3, 1950	$58,089.75	
Jan. 3, 1950		$20,040.96
Sometime in Nov., 1950	8,321.67	
Sometime in Nov., 1950		1,451.22

Table 4: Collections after 7-1-49. The following table sets forth all the collections made after July 1, 1949, with respect to Plaintiff's 1943 E.P.T. Liability:

Date and Method of Collections	Amount Collected With Respect to Tax Liability Exclusive of Any Interest	Amount Collected With Respect to Interest
Dec. 14, 1949; payment	$58,089.75	
Dec. 14, 1949; payment		$20,040.96
Sometime in Nov., 1950, offset by various credits	8,321.67	
Sometime in Nov., 1950, offset by various credits		1,451.22

JOINT EXHIBIT No. 3-C
(Admitted in evidence 1/5/56)

United States District Court for the Southern District of California, Northern Division
No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

EXHIBIT TO STIPULATION

It Is Hereby Stipulated, that for the purpose of this proceeding the attached true and correct copy of the Plaintiff's Application for Relief Under Sec. 722 for the Taxable Year 1942 is the material referred to in the Stipulation of Facts as Joint Exhibit "3-C," and may be accepted as fact as though incorporated in full within the said Stipulation.

Dated: This 5th day of January, 1956.

KIMBLE, THOMAS, SNELL, JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Form 991
TREASURY DEPARTMENT
Internal Revenue Service
(Revised January 1943)

RECEIVED
SEP 15 1943
CLAIMS SECTION

APPLICATION FOR RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

7576

(To be executed and filed in duplicate)

Sunland Sulphur Co. (Name of corporation) of P.O. Box 761 - Calif. (Address of corporation)

hereby makes application for relief under section 722 of the Internal Revenue Code with respect to its excess profits tax taxable year indicated below, and in support of such application submits the following information

1. Date of incorporation August 1, 1930 2. State or country California

3. Excess profits tax taxable year for which the benefits of section 722 are claimed 1942

4. Collection district in which the excess profits tax return for the year was filed First of California

5. Date filed May 15, 1943 period of extension, if any, granted for filing return 60 days from 3-15-43

6. Excess profits tax shown upon the excess profits tax return for the year (Computed prior to the deferment under section 710 (a) (5), to the foreign tax credit under section 729, to the credit for debt retirement under section 782, and to the adjustment under section 734-1) $ 93487.89

7. Excess profits tax computed after application of section 722 (Computed prior to the deferment, to the credits and to the adjustment as provided in line 6.) $ None

8. Reduction in tax under section 722 (line 6 minus line 7) $ 93487.89

9. Adjusted excess profits net income computed without regard to section 722 $ 1038754.43

10. Normal-tax net income computed without the credit provided in section 26 (c) for income subject to excess profits tax $ 136220.71

11. Percentage which line 9 is of line 10 76.2%

12. If line 11 exceeds 50 percent, amount of tax deferred under section 710 (a) (5) (33 percent of line 8) (enter as item 17, page 1, Form 1121) $ 30851.06

13. Total net relief claimed with respect to tax shown on return (line 6 minus line 12) $ 62636.83

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed $ 46977.67

15. Amount of refund or credit for which this application is a claim (see Instruction III) $ 93489.89

IF APPLICATION FILED AS A RESULT OF DEFICIENCY

16. Excess profits tax shown in preliminary notice or notice of deficiency $

17. Excess profits tax after application of section 722 $

18. Reduction in tax under section 722 (line 16 minus line 17) $

[1] If any adjustments have been made subsequent to the filing of the return, enter the adjusted amount.
[2] Amount of reduction of tax may not exceed deficiency finally determined without reference to section 722.

Clearing Div. Sec. 722
Section 732 Notice: Allowed: ✓ Rej.
To agent ____ In part ____
To taxpayer 5/11/50 In full ____
RAR 5/11/50
Closed Approved EPC 1/23/50

OCT 1943 SAN FRAN

OCT 2 - 1943

MCL - OCT 10 1950

noted mcl
C.R.
10/30/50

SCHEDULE A—CONSTRUCTIVE BASE PERIOD NET INCOME

1. Has an application for a constructive average base period net income been made for a prior taxable year? No

   If so, state year or years 1941

2. Has a constructive average base period net income been finally determined and used in connection with a prior taxable year? No

3. If answer to line 2 is "yes," state:
   (a) Amount determined for use in computing excess profits tax for prior year $
   (b) Year for which constructive average base period net income used in computing excess profits tax
   (c) Date of determination of constructive average base period net income
   (d) By whom determination was made
   (e) Reason for claim for constructive average base period net income for use in the taxable year other than the amount set forth in (a) (attach statement).
   (f) In the case of an affiliated group filing consolidated excess profits tax returns, have any new members been acquired by the group, or have any former members departed from the group after the date upon which such constructive average base period net income was determined? If answer is "yes," attach particulars.

	Year	Amount
4. Excess profits net income or deficit in excess profits net income for each taxable year in the base period, computed without regard to section 722.	1936	$ 30020.09
answer to 4 See financial Exhibits A to J and summary thereof attached in support of reconstructed base average of $32729.48. See also repository Test Exhibit A to Schedule B attached	1937	$ 32658.94
	1938	$ 2024.85
	1939	$ 2843.50
Total		$ 70135.28
5. Average base period net income determined without regard to section 722		$ 23533.82

(a) Is the benefit of section 713 (e) (1) (relating to exclusion of deficit or to increase in lowest year in base period) claimed?

(b) Is the benefit of section 713 (f) (relating to increased earnings in last half of base period) claimed? No

(c) If answer to (a) or (b) is "yes," furnish computation.

6. Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year (Furnish particulars supporting amount claimed and details involved in computation.) $ 8279.46

Has Supplement A been availed of in determining average base period net income? Has a separate constructive average base period net income been finally determined for any component prior to the time this application is made? No Attach schedule showing former names, addresses, and all pertinent information for each component corporation for each year of existence prior to consummation of application of section 722.

7. (a) If business was commenced during base period or after December 31, 1939, is business a continuation in whole or in part of a preexisting business? Business commenced prior to base period

(b) If answer to (a) is "yes," furnish particulars.

(c) Is the taxpayer a member of an affiliated group making a consolidated excess profits tax return? No

(d) If answer to (a) is "yes," is the affiliated group filing a consolidated excess profits tax return making application for relief under section 722?

8. If answer to (a) and (b) is "yes," state:
   (1) First taxable year for which a consolidated excess profits tax return was made
   (2) Whether a constructive average base-period net income has been finally determined for any member of the group
   (3) Names and addresses of each member of the group, and furnish all pertinent information necessary to determine constructive average base period net income of such group.

9. If the taxpayer came into existence after December 31, 1939, state date after which capital additions and capital reductions were made

10. Taxpayer claims constructive average base period net income See 8(a) above

11. Taxpayer claims benefit of section 713 (a) (2) (K) (relating to nontaxable income of certain industries with depletable assets), and submits computation of, and states the fair and just amount of:

    (a) Normal output during base period as defined in section 736 (a) (5)

    (b) Amount per unit of normal output (a) per $ per

SCHEDULE B—TAXPAYERS ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A, if the taxpayer computes its average base period net income pursuant to Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☐ 1. Normal production, output, or operation was interrupted during the base period because of unusual and peculiar events (section 722 (b) (1)).

(a) Describe the events and time of occurrence.

(b) State taxable years in the base period during which production, output, or operations were affected

☑ 2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events (section 722 (b) (2)).

(a) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member

(b) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.

See explanatory Statement Exhibit A to Schedule B attached

3. The business of the taxpayer was depressed in the base period because of membership in an industry affected by conditions subjecting the taxpayer to:

☐ A profits cycle differing materially from the general business cycle (section 722 (b) (3) (A)), or

☐ Sporadic and intermittent periods of profits inadequately represented in the base period (section 722 (b) (3) (B)).

(a) Describe character of the industry and furnish names and addresses of other members of the industry.

(b) Furnish data establishing that the taxpayer was depressed by reason of an unusual profits cycle, or

(c) Furnish data establishing that the taxpayer was depressed by reason of realization of sporadic profits inadequately represented in the base period.

☑ 4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (section 722 (b) (4)).

(a) On what date did commencement of business or change in character of business occur? 1936 - new territories
1937 - mixed furnaces added
1939 - seed plant added

(b) If change in character of the business has occurred, submit statement of

(1) Nature of change in character of business.

(2) Portion of the definition in section 722 (b) (4) within which such change is claimed to have occurred.

(3) Evidence supporting contention that average base period net income does not reflect normal operations for the entire base period.

(c) Did the business reach, by the end of the base period, the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, 2 years prior to the time the commencement or change occurred? No If answer is "no," furnish particulars. See explanatory Statement Exhibit A to Schedule B attached

(d) Was change in capacity for production or operation of business consummated during a taxable year ending after December 31, 1939, as a result of a course of action to which taxpayer was committed prior to January 1, 1940? yes

(e) If answer to (d) is "yes": See explanatory Statement Exhibit A to Schedule B attached

(1) State date upon which such change was consummated and extent to which income for such year reflects such change.

(2) Submit evidence of commitment to a course of action prior to January 1, 1940.

(3) Attach schedule showing net capital addition or net capital reduction (section 713 (g) (1) or (2)) and the amount of money or property expended after the beginning of the first excess profits tax taxable year under the Internal Revenue Code in changing the capacity for production or operation of the business.

☑ 5. Other factors producing an average base period net income which is an inadequate standard of normal earnings and which are not inconsistent with the principles and limitations of section 722 (b) (section 722 (b)(5)).

(a) Describe other factors claimed to affect business during the base period and to result in an average base period net income which is an inadequate standard of normal earnings

See explanatory Statement Exhibit A to Schedule B attached

SCHEDULE C—TAXPAYERS NOT ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer not entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☐ 1. The business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income (section 722 (c) (1)).

(a) Describe character of intangible assets.

(b) State names and addresses of other corporations believed to be in the same class of business where intangible assets of a similar character make important contributions to income.

☐ 2. The business of the taxpayer is of a class in which capital is not an important income-producing factor (section 722 (c) (2)).

(a) Describe nature of the business and explain why capital is not an important income-producing factor.

(b) State names and addresses of other corporations believed to be in the same class of business in which capital is not an important income-producing factor.

☐ 3. The invested capital of the taxpayer is abnormally low (section 722 (c) (3)).

(a) Describe circumstances causing invested capital to be abnormally low.

AFFIDAVIT

We, the undersigned officers of the corporation for which this application is made, being duly sworn, each for himself poses and says that the statements made herein (including any accompanying schedules and statements) are, to the st of his knowledge and belief, true, correct, and complete statements of facts made in good faith pursuant to the quirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

J. L. Harper — President
(Title)

B. H. Jones — Sec. & Treas.
(Title)

[CORPORATE SEAL]

Subscribed and sworn to before me this 13 day of September, 194?

E. B. Bradford
(Signature of officer administering oath)

Notary Public
(Title)

c-4

Sunland Sulphur Co.
Fresno, Calif.

Summary of Profit and Loss accounts for base period
per reconstructed Profit and Loss statements

		Sunland	Calco	Total	Excess Profits Tax per returns
year 1936 Exhibit	A	93108.79	7099.57	100208.36	
1937	B	71600.00	15422.93	87062.93	
1938	C	81901.16	338.54	82239.70	
1939	D	77759.35	1060.96	78818.31	
Total		324369.74	24819.66	348229.30	

Calco Supply stores merged with Sunland Sulphur Co 10-31-39 by statutory authority

average for base period			86559.35	
Excess profits credit 95%			82229.38	
1940 E.P. Tax Income	33516.33			463.76
E.P. Tax Credit	82229.38			
carry over		48713.05		
1941 E.P. Tax Income	53439.19			9432.85
E.P. Tax credit	82229.38			
carry over		28790.19		
Total carry over to 1942		77503.24		
1942 E.P. Tax Income			136220.71	93497.87
E.P. Tax credit	82229.38			
Specific credit	500000	82229.38		
total credit			164732.57	

no E.P. Tax on basis of reconstructed P&L

JOINT EXHIBIT No. 4-D
(Admitted in evidence 1/5/56)

United States District Court for the Southern District of California, Northern Division
No. 1162-ND Civil

SUNLAND INDUSTRIES, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

EXHIBIT TO STIPULATION

It Is Hereby Stipulated, that for the purpose of this proceeding the attached true and correct copy of the Plaintiff's Application for Relief Under Sec. 722 for the Taxable Year 1943 is the material referred to in the Stipulation of Facts as Joint Exhibit "4-D," and may be accepted as fact as though incorporated in full within the said Stipulation.

Dated: This 5th day of January, 1956.

KIMBLE, THOMAS, SNELL, JAMISON & RUSSELL,

By /s/ WILLIAM N. SNELL,
Attorneys for Plaintiff.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Form 991
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised January 1943)

RECEIVED
Page 1
Section 722

APPLICATION FOR RELIEF UNDER SECTION 722 OF THE INTERNAL REVENUE CODE

42900

(To be executed and filed in duplicate)

SUNLAND INDUSTRIES, INC. of P. O. Box 960, Fresno, California
(Name of corporation) (Address of corporation)

formerly Sunland Sulphur Co.

hereby makes application for relief under section 722 of the Internal Revenue Code with respect to its excess profits tax taxable year indicated below, and in support of such application submits the following information:

1. Date of incorporation August 1, 1930 2. State or country California

3. Excess profits tax taxable year for which the benefits of section 722 are claimed 1943

4. Collection district in which the excess profits tax return for the year was filed First in California

5. Date filed March 15, 1944 period of extension, if any, granted for filing return None

6. Excess profits tax shown upon the excess profits tax return for the year (Computed prior to the deferment under section 710 (a) (5), to the foreign tax credit under section 729, to the credit for debt retirement under section 783, and to the adjustment under section 734.) $ 193,238.42

7. Excess profits tax computed after application of section 722 (Computed prior to the deferment, to the credits and to the adjustment as provided in line 6.) $ 147,744.10

8. Reduction in tax under section 722 (line 6 minus line 7) $ 45,494.32

9. Adjusted excess profits net income computed without regard to section 722 $ 254,851.77

10. Normal-tax net income computed without the credit provided in section 26 (e) for income subject to excess profits tax $ 266,995.13

11. Percentage which line 9 is of line 10 95 %

12. If line 11 exceeds 50 percent, amount of tax deferred under section 710 (a) (5) (33 percent of line 8) (enter as item 1, page 1, Form 1121) $ 63,768.68

13. Total net relief claimed with respect to tax shown on return (line 8 minus line 12) $ (18,274.36)

14. Total excess profits tax for the taxable year paid at or prior to time this application is filed $ 129,469.74

15. Amount of refund or credit for which this application is a claim (see Instruction III) $ None

IF APPLICATION FILED AS A RESULT OF DEFICIENCY

16. Excess profits tax shown in preliminary notice or notice of deficiency $

17. Excess profits tax after application of section 722 $

18. Reduction in tax under section 722 (line 16 minus line 17) $

[1] If any adjustments have been made subsequent to the filing of the return, enter the adjusted amount.
[2] Amount of reduction of tax may not exceed deficiency finally determined without reference to section 722.

16—[illegible]

Section 722 Unit: Approved: Rel. ✓
To assistant
To taxpayer 5/11/50
Closed Approved 1/23/50

NOV 10 1950

SCHEDULE A—CONSTRUCTIVE BASE PERIOD NET INCOME

1. Has an application for a constructive average base period net income been made for a prior taxable year? Yes

If so, state year or years 1940- 1941 - 1942

2. Has a constructive average base period net income been finally determined and used in connection with a prior taxable year? No

3. If answer to line 2 is "yes," state:

(a) Amount determined for use in computing excess profits tax for prior year ..... $

(b) Year for which constructive average base period net income used in computing excess profits tax .....

(c) Date of determination of constructive average base period net income .....

(d) By whom determination was made .....

(e) Reason for claim for constructive average base period net income for use in the taxable year other than the amount set forth in (a) (attach statement).

(f) In the case of an affiliated group filing consolidated excess profits tax returns, have any new members been acquired by the group, or have any former members departed from the group after the date upon which such constructive average base period net income was determined? ..... If answer is "yes," attach particulars.

	Year	Amount
4. Excess profits net income or deficit in excess profits net income for each taxable year in the base period, computed without regard to section 722.	1936	$ 31,020.19
	1937	$ 32,655.74
	1938	$ 2,024.85
	1939	$ 28,434.50
Total		$ 94,135.28
5. Average base period net income determined without regard to section 722		$ 23,533.82

(a) Is the benefit of section 713 (e) (1) (relating to exclusion of deficit or to increase in lowest year in base period) claimed? .....

(b) Is the benefit of section 713 (f) (relating to increased earnings in last half of base period) claimed? .....

(c) If answer to (a) or (b) is "yes," furnish computation.

6. Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year. (Furnish particulars supporting amount claimed and details involved in computation.) ..... $ 90,201.74

7. Has Supplement A been availed of in determining average base period net income? ..... Has a separate constructive average base period net income been finally determined for any component prior to the time this application is made? No . Attach schedule showing former names, addresses, and all pertinent information for each component corporation for each year of existence necessary to determination of application of section 722.

8. (a) If business was commenced during base period or after December 31, 1939, is business a continuation in whole or in part of previously existing business? Commenced prior to base period

(b) If answer to (a) is "yes," furnish particulars.

9. (a) Is the taxpayer a member of an affiliated group making a consolidated excess profits tax return? No

(b) If the answer to (a) is "yes," is the affiliated group filing a consolidated excess profits tax return making application for relief under section 722? .....

(c) If answer to (a) and (b) is "yes," state:

(1) First taxable year for which a consolidated excess profits tax return was made .....

(2) Whether a constructive average base-period net income has been finally determined for any member of the group .....

(3) Names and addresses of each member of the group, and furnish all pertinent information necessary to determine constructive average base period net income of such group.

10. If the taxpayer came into existence after December 31, 1939, state date after which capital additions and capital reductions were not taken into account in computing constructive average base period net income See 8 (a) above

11. If the benefits of section 711 (a) (1) (I) or 711 (a) (2) (K) (relating to nontaxable income of certain industries with depletable resources) are claimed, attach schedule showing the computation of, and state the fair and just amount of:

(a) Normal output during the base period as defined in section 735 (a) (5) .....

(b) Normal unit profit as defined in section 735 (a) (6), $ ..... per .....

SCHEDULE B—TAXPAYERS ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A, if the taxpayer computes its average base period net income pursuant to Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☐ 1. Normal production, output, or operation was interrupted during the base period because of unusual and peculiar events (section 722 (b) (1)).

(a) Describe the events and time of occurrence.

(b) State taxable years in the base period during which production, output, or operations were affected.

☒ 2. The business of the taxpayer was depressed during the base period or the taxpayer was a member of an industry which was depressed during the base period because of temporary and unusual economic events (section 722 (b) (2)).

(a) Describe the temporary economic events unusual in the case of the taxpayer or an industry of which it was a member.

(b) If claim of depression is based on membership in depressed industry, describe industry, and furnish names and addresses of other members of such industry.

See Exhibit A to Schedule B attached

3. The business of the taxpayer was depressed in the base period because of membership in an industry affected by conditions subjecting the taxpayer to:

☐ A profits cycle differing materially from the general business cycle (section 722 (b) (3) (A)), or

☐ Sporadic and intermittent periods of profits inadequately represented in the base period (section 722 (b) (3) (B)).

(a) Describe character of the industry and furnish names and addresses of other members of the industry.

(b) Furnish data establishing that the taxpayer was depressed by reason of an unusual profits cycle, or

(c) Furnish data establishing that the taxpayer was depressed by reason of realization of sporadic profits inadequately represented in the base period.

☒ 4. The business of the taxpayer was commenced or there was a change in the character of the business immediately prior to or during the base period (section 722 (b) (4)).

See exhibit A to Schedule B attached

(a) On what date did commencement of business or change in character of business occur? ...

(b) If change in character of the business has occurred, submit statement of:

(1) Nature of change in character of business.

(2) Portion of the definition in section 722 (b) (4) within which such change is claimed to have occurred.

(3) Evidence supporting contention that average base period net income does not reflect normal operations for the entire base period.

(c) Did the business reach, by the end of the base period, the earning level it would have reached if the business had been commenced, or if the change in the character of the business had occurred, 2 years prior to the time the commencement or change occurred? If answer is "no," furnish particulars.

(d) Was change in capacity for production or operation of business consummated during a taxable year ending after December 31, 1939, as a result of a course of action to which taxpayer was committed prior to January 1, 1940? ...

(e) If answer to (d) is "yes":

(1) State date upon which such change was consummated and extent to which income for such year reflects such change.

(2) Submit evidence of commitment to a course of action prior to January 1, 1940.

(3) Attach schedule showing net capital addition or net capital reduction (section 713 (g) (1) or (2)) and the amount of money or property expended after the beginning of the first excess profits tax taxable year under the Internal Revenue Code in changing the capacity for production or operation of the business.

☒ 5. Other factors producing an average base period net income which is an inadequate standard of normal earnings and which are not inconsistent with the principles and limitations of section 722 (b) (section 722 (b)(5)).

(a) Describe other factors claimed to affect business during the base period and to result in an average base period net income which is an inadequate standard of normal earnings.

See Exhibit A to Schedule B attached

SCHEDULE C—TAXPAYERS NOT ENTITLED TO THE EXCESS PROFITS CREDIT BASED ON INCOME

If the excess profits tax is claimed to be excessive and discriminatory in the case of a taxpayer not entitled to use the excess profits credit based on income pursuant to section 713 (or Supplement A), check one or more of the following reasons and supply the general information called for in the instructions as well as that indicated below:

☐ 1. The business of the taxpayer is of a class in which intangible assets not includible in invested capital under section 718 make important contributions to income (section 722 (c) (1)).

(a) Describe character of intangible assets.

(b) State names and addresses of other corporations believed to be in the same class of business where intangible assets of a similar character make important contributions to income.

☐ 2. The business of the taxpayer is of a class in which capital is not an important income-producing factor (section 722 (c) (2)).

(a) Describe nature of the business and explain why capital is not an important income-producing factor.

(b) State names and addresses of other corporations believed to be in the same class of business in which capital is not an important income-producing factor.

☐ 3. The invested capital of the taxpayer is abnormally low (section 722 (c) (3)).

(a) Describe circumstances causing invested capital to be abnormally low.

16—63930-1

AFFIDAVIT

We, the undersigned officers of the corporation for which this application is made, being duly sworn, each for himself deposes and says that the statements made herein (including any accompanying schedules and statements) are, to the best of his knowledge and belief, true, correct, and complete statements of facts made in good faith pursuant to the requirements of section 722 of the Internal Revenue Code and the regulations issued thereunder.

[illegible] Pres.
(Name) (Title)

[CORPORATE SEAL]

[illegible] Secty.
(Name) (Title)

Subscribed and sworn to before me this 9 day of March, 1946

[illegible]
(Signature of officer administering oath)

[illegible]
(Title)

U. S. GOVERNMENT PRINTING OFFICE 16—[illegible]

2-4

In the United States District Court, Southern District of California, Northern Division

No. 1162-ND

SUNLAND INDUSTRIES, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Honorable Ernest A. Tolin, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:
KIMBLE, THOMAS, SNELL, JAMISON & RUSSELL, By
WILLIAM N. SNELL, ESQ., and
MICHAEL F. OGLO, ESQ.

For the Defendant:
LAUGHLIN E. WATERS,
United States Attorney, By
EDWARD R. McHALE,
Assistant United States Attorney, Chief of Tax Division.

January 5, 1956—10:00 A.M.

The Clerk: Case No. 1162-ND, Sunland Industries, Inc., v. United States of America.

Mr. Snell: William N. Snell and Michael F. Oglo for the plaintiff.

Mr. McHale: Edward R. McHale ready for the defendant.

Mr. Snell: If the court please, I would like to make a brief opening statement.

This case arises under the World War II Excess Profits Tax Act. This act was originally enacted in 1940, and it was successively amended by several revenue acts and finally repealed in 1945. The particular provisions which are involved were enacted as a part of the 1942 Revenue Act which became effective in October of 1942. The law was unique and complex. It was quite complicated. And, of course, there was very little time to have rulings and judicial decisions and the like that would make the responsibilities of the taxpayer and the Government clear at that time.

In like manner, the regulations were promulgated under these particular sections becoming effective in March of 1943.

The taxable year in issue in this case is the taxable year 1943, the return for which was filed in March of 1944.

In this action the plaintiff is seeking a refund of [2*] excess-profits taxes which were paid for 1943. When the return was filed it disclosed a taxable income of approximately $250,000 and showed a total excess-profits taxability of approximately $200,000. The exact amount was one hundred and ninety-three thousand some-odd dollars.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

At the time of filing a return, or at the time payments would have become due, the plaintiff paid only $130,000 of this liability. The balance was paid on December 14, 1949, over six years later. And it is this balance of payment of some $60,000 to $70,000 that the plaintiff is seeking the refund of in this action.

In addition to the principal of tax, by the time the tax was paid the statutory interest had run on this payment to a sum of approximately $20,000. And that was also paid on December 14, 1949. The plaintiff is also seeking a refund of that interest.

Then in addition the plan of taxation under the revenue laws provides that when a refund becomes due to a taxpayer he is entitled to interest on the amount paid, running from the date of payment. And we are also seeking that statutory interest.

The facts of the case have been made the subject of a written stipulation which we will introduce as a joint stipulation this morning. There is no substantial controversy regarding the relevant facts. These facts plaintiff feels [3] will prove our contentions as set forth in the pleadings.

Now, there are perhaps some differences of opinion between the defendant and the plaintiff as to the relevance and the materiality of the facts we have stipulated to, and for that reason we have reserved to both parties the right to object to the materiality and the relevance of these stipulated facts. It is our understanding that such objections will be made in briefs which we propose will be filed, and that

normal commercial situation the statute is simply a procedural bar. It does not discharge the liability. If the liability is paid, the obligee is entitled to keep it. The obligor has no right to refund.

Under the tax laws Congress saw fit to enact a section into the Revenue Code, 377(a)(2), which provides that if a tax is paid after the applicable statute of limitations has expired, that tax is to be considered illegally assessed and [6] collected, and shall be refunded.

In the ordinary statute-of-limitations case it is generally assumed also that the bar of the statute is available to the party to be benefited, whether or not the amount involved is, in justice and fairness, due and payable. While we feel the same principle applies to this case, the plaintiff does not concede that the amount here involved should be considered due and payable, in justice and fairness.

And the plaintiff wishes to point out that the particular law involved, the World War II Excess Profits Tax Act, was a rather harsh and inequitable law; that its harshness and inequity was not applied generally to all taxpayers covered by it but in the case of the small corporations, such as the plaintiff, the harshness and inequity was much greater than in the case of the larger corporations.

I would also like to point out that the plan of limitation adopted by Congress is a double-edged sword, applying in one case in favor of the Government and in another in favor of the taxpayer; and it is also our position that the same principle should govern in both cases.

The specific issue involved in this case is whether the general statute of limitations contained in Section 275(a) of the Revenue Code applies to this payment that was made in December of 1949, or whether it was governed by a special statute of limitations contained in 710(a)(5) of the Internal [7] Revenue Code of 1939. The plaintiff's contention is that the general statute controlled and that the general statute had expired.

There is a third possibility which the plaintiff puts forward, that if the amount paid was not governed in itself entirely by the general statute, it was governed in part by the general statute and in part by the special statute.

I might say, by way of clarification of the facts, that the time between the filing of the return and the ultimate payment was consumed by giving consideration to a relief claim, and the relief claim was made under Section 722, which again, I think it is fair to say, is a very complex law.

The 722 sections, which are generally described as excess-profits-tax-relief sections, was one of the most complex and one of the most difficult. And it again is plaintiff's contention that the relief provisions have no direct bearing on this case. I believe that it would be the Government's contention that they do.

But, as you have suggested, we have endeavored to present a question of law, and we do not feel that consideration should be given by the court to all of the facts and contentions which were involved in

the question of whether the benefits of Section 722 were available to this plaintiff. We have tried to eliminate that. Of necessity, it does come in in an oblique manner, but it is not necessary to [8] consider the rights of the parties or what was or should have been the outcome of those provisions.

I believe that concludes my opening statement.

Mr. McHale, do you wish to add to what I have said?

Mr. McHale: I think Mr. Snell made a very clear explanation to the court of what the issue is. And it is the Government's contention that the special statute of limitations which was explained to your Honor in the brief applies, and the assessment of the tax and payment of the tax were all timely made, and therefore the plaintiff is not entitled to a refund; that if there were any requirement in the regulations issued by the Secretary of the Treasury that the tax be assessed by a particular time, under the particular facts of this case, the Commissioner waived the requirements of the regulations, which he could do, and the tax was assessed timely.

The Court: Is this case entirely a statute-of-limitations matter?

Mr. McHale: Yes, your Honor.

The Court: Suppose there were no question as to the question of statute of limitations. Has there been an overpayment of tax?

Mr. McHale: No, your Honor. That issue is not part of this case. I mean, the Commissioner made a determination that there hadn't, and—— [9]

Mr. Snell: Well, if the court please, I would like to say that that might be the subject of a difference of opinion but that this would not be the forum in which to try that particular issue.

I think that is a fair statement of the situation——

Mr. McHale: Yes, I think so.

Mr. Snell: ——that under the statute this would not be the forum in which to try the question other than the statute of limitations.

Mr. McHale: Under 722 the excess profits tax, as your Honor knows, is restricted to the Tax Court for determination. The District Court has no jurisdiction over 722 cases. That exclusively rests in the Tax Court. The only reason excess profits comes in this court is on the statute-of-limitations issue.

The Court: Then so far as this particular court is concerned, all we must determine is the statute-of-limitations question.

Mr. Snell: That is correct, your Honor.

The Court: Have you provided in your stipulation for briefing time?

Mr. Snell: No, your Honor. We had anticipated that we would ask for briefs on a 30 days, 30 days, 20 days basis.

The Court: Is that acceptable? [10]

Mr. McHale: That is acceptable, your Honor.

The Court: Is that going to rush anyone unduly?

Mr. Snell: I do not believe so.

The Court: I want a pretty good brief, and I don't want you to have to sit up until midnight to meet a deadline.

Mr. Snell: I believe we can submit our opening brief in 30 days. There may be a question on answering Mr. McHale's brief.

I would like to make this offer, as far as the plaintiff is concerned: If the Court feels it would like to have oral argument after the briefs have been submitted, we would be very pleased to appear in Los Angeles for oral argument.

Mr. McHale: I think the time is ample, your Honor. And if by chance they want additional time after my brief, I will be glad to consent.

The Court: There will be no problem, that is, no insurmountable problem, in arranging for time for oral argument. It might be that the court will feel that it would like to have particular phases of the briefs expanded upon.

We do have the present situation which the judges of the court are faced with, in that there appears to be in many areas—I haven't noticed it in Fresno—a sort of chamber-of-commerce philosophy that various districts should be broken down in a great number, and a great number of new [11] ones created. As you know, we presently have some ninety-odd District Courts of the United States, and they have many divisions. So the various juricial conferences to which the district judges belong have understaken to preserve the autonomy of the various divisions of the district to the extent they do obtain, in order to keep a proper respect for having local cases heard in the locality where they arise.

But you are Fresno counsel, aren't you?

Mr. Snell: Yes, your Honor.

The Court: And you, Mr. McHale, come from Los Angeles to Fresno occasionally.

Mr. McHale: Yes, your Honor.

The Court: So, if need for further argument develops, I am afraid that in order to keep consistent with the policy of the court I will have to come back here someday and hear it. But I come here occasionally, too, and we will just get together on some date that is mutually acceptable so that there will not be any undue travel demands made for this particular case.

Mr. Snell: Well, that, of course, would suit counsel for the plaintiff because this is home for me. But whatever is convenient for Mr. McHale and the court——

Mr. McHale: The United States Attorney will be present wherever the court wishes it set.

The Court: Is there anything further in this case today? [12]

Mr. Snell: I have not offered in evidence the stipulation, your Honor. I have a few short comments regarding that matter.

The original stipulation was not given an exhibit number, and we gave to the exhibits to the stipulation exhibit numbers starting with 1-A. They are joint exhibits. I don't know how we are to handle that as a matter of procedure, but I would like to now offer in evidence a document entitled, "Stipulation of Facts," together with seven separate documents entitled Exhibits 1-A through 7-G, which are

exhibits to the stipulation of facts and are submitted as exhibits, joint exhibits to the joint stipulation of facts.

Mr. McHale: Yes, subject to the objections that Mr. Snell mentioned.

The Court: Is it going to be necessary for this court to make findings of fact?

Mr. McHale: Well, I understand the civil rule provides in every civil case tried without a jury that findings must be made, although——

The Court: Will, I think the law requires it unless findings be waived. Sometimes opinions of course have been considered by the appellant court to suffice findings. But where you have agreed by stipulation as to what the facts are, I wonder if you want findings in this case.

Mr. McHale: I think so. I think there may be some [13] ultimate facts that should be found.

The Court: I suppose that would be a natural result from the fact that there are going to be objections to relevancy and materiality which will come along with your briefs.

With that in mind, I have always found it very helpful, particularly in tax cases or other cases of a technical nature, to know exactly what facts the various parties to the case feel must be found by the court in order to support their position. So may I ask you in your briefs to please submit a proposed finding of facts so that I can see what facts in the formal findings the court would have to find in order to sustain your position.

Mr. Snell: We will be pleased to do so.

The Court: Do you have an objection to that procedure?

Mr. McHale: No. I am quite willing to do so.

The Court: Mr. Hochman was bewailing it here yesterday. He says whenever he has done that—and there are several judges who are now asking for that—that he has lost. But I still think it does help the judge to direct his thinking to the problems a bit more acutely than if we do not have the actual findings which the judge will have to make to sustain a particular position.

Mr. McHale: May I ask this, your Honor: Some portions of the stipulation, could they be incorporated by reference in the proposed findings rather than to set them out all over [14] again?

The Court: Yes, if you can do that so I will not need, say, these two tables and need to run around from one to the other, looking at the various exhibits.

Mr. McHale: I was thinking whether the sort of thing such as jurisdictional facts would be necessary for either party to put in the findings.

The Court: We will skip those.

Mr. McHale: Payment and demand for refund.

The Court: Those things will not be necessary. I don't want the findings in final form, but the findings on the tax controversy, the statute-of-limitations controversy, is what I have in mind. Then whoever prevails can prepare the ultimate findings which will include the formal matters.

Mr. McHale: That is satisfactory.

Mr. Snell: That is satisfactory to the plaintiff.

The Court: The stipulation and exhibits thereto are received in evidence.

Mr. Snell: I forgot to say that I have only the exhibits for the original stipulation, whereas the rules call for a copy as well. We had some difficulty getting the necessary photostats, and we have tried to get clear ones, although we haven't succeeded in all cases in getting as clear ones as we would like to have them. But in the event there is any ambiguity as to the photostats, it is my understanding [15] that Mr. McHale will be willing to furnish the originals of all exhibits.

Mr. McHale: There are some pencil notations on some exhibits, made by Internal Revenue employees, and we are happy in that case to let the court know about that in case it should become a crucial issue at all; and we have the originals in our possession if the court wishes to look at them.

The Court: Mr. Clerk, is there any problem about sending the original file to Los Angeles?

The Clerk: No, sir.

The Court: What we are talking about here is that, under the rules of the court, documents are supposed to be filed in duplicate, and a master file remains in the court's possession in the district where the case is pending, and the judge has a working file which he might work up or use as he wants to.

But in this case there are apparently difficulties in having duplicates, so I will need to work with the originals. Can you send those to me?

The Clerk: Yes, sir, we can.

The Court: Then we will not need to have those files in duplicate.

Mr. Snell: Thank you. I do have one comment relative to the matter which Mr. Hale mentioned, the penciled [16] notations on some of the documents.

I would like to call, in particular, to the court's attention, a pencil notation on Exhibit 7-G. On the first page of the photostat exhibit there appears the statement, "To cover standard issues (deferment)," which was placed on there presumably by the defendant. It was not on the original when filed.

And in like manner there is a pencil interlineation on page 3 of the same exhibit, which reads, "and income taxes," which was not on the original when it was filed, and presumably placed on the original by the employees of the defendant in consideration of the claim.

There may be others. That one came to my attention this morning, and I feel it should be specifically called to the court's attention.

The Court: Well, if there are others, direct my attention to them in your memorandum or brief.

Mr. Snell: Yes, your Honor. I believe that we are prepared to submit the case.

The Court: It will be deemed submitted as of the time the closing brief is in. I say that for statistical reasons, too. The courts are supposed to keep current with their cases, and we begin to get needled by higher authority if we keep the case under submission longer than six months. And if

this is a case that is as complex as has been indicated, I [17] might need six months from the time the closing brief is in, because I am not going to start giving it intense attention until briefs are in, so I can see the entire thing at once. So the submission will be deemed as of the receipt of the closing brief.

The Clerk: Is this Exhibit No. 1?

The Court: Plaintiff's Exhibit No. 1.

Mr. Snell: If the court please, we had joint exhibits which were 1-A through 7-G. I wonder if we could give the stipulation an exhibit number of just "Stipulation of Facts"? That may be unique, but for clarification it might be the best thing to do.

The Court: All right. Is that agreeable, Mr. McHale?

Mr. McHale: Anything that is convenient to the court.

The Court: Mark it, Mr. Clerk, "Stipulation of Facts," and we will not give it an exhibit number. That means you both vouch for it.

Mr. Snell: It is so intended to be a joint stipulation.

The Court: The Stipulation of Facts and Exhibits 1-A through 7-G may be received in evidence.

(The documents referred to, marked as Stipulation of Facts and Joint Exhibits 1-A through 1-B, respectively, were received in evidence.)

The Court: Is there anything further?

Mr. McHale: Nothing further, your Honor. [18]

Mr. Snell: Nothing further, your Honor.
The Court: Thank you.
We will adjourn until tomorrow. [19]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that staid transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of February, A.D. 1956.

/s/ DON P. CRAM,
Official Reporter.

Filed Sept. 14, 1956 (U.S.C.A.).

Docketed Oct. 1, 1956 (U.S.C.A.).

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby Certify that the foregoing pages numbered 1 to 227, inclusive, contain the original

Complaint;

Summons;

Stipulation & Order Extending Time to Plead, filed 7-1-52; 8-29-52; 10-1-52 and 11-3-52;

Answer;

Stipulation & Order to Vacate Hearing Under Rule 10(d);

Stipulation of Facts;

Appendixes to Plaintiff's Brief;

Plaintiff's Brief;

Defendant's Brief;

Plaintiff's Reply Brief;

Motion & Notice of Motion for New Trial;

Memorandum in Opposition to Motion for New Trial;

Order Overruling Plaintiff's Objections to introduction of Evidence;

Notice of Entry of Judgment;

Motion & Notice of Motion to Amend and Supplement Findings of Fact and Conclusions of Law together with Points & Authorities in Support thereof;

Supplemental Stipulation of Facts;

Bill of Costs;

Satisfaction of Judgment;

Findings of Fact and Conclusions of Law and Judgment;

Order Granting in Part and Denying in Part Plaintiff's Motion to Amend and Supplement Findings of Fact, Conclusions of Law;

Order denying motion for new trial;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Letter dated March 23, 1956, from Court to Counsel.

which, together with a full, true and corect copy of; the Minutes of the Court for November 1, 1954, January 5, 1955, January 14, 1955, January 25, 1955, March 21, 1955, June 16, 1955, October 3, 1955, January 5, 1956, March 23, 1956, April 6, 1956, May 11, 1956; Notification of Court that "dismissal of the above action, under Rule 10(d) has been continued to January 5, 1955," etc.; a photostatic copy of Bond for Costs on Appeal; and "Joint Exhibits" 1-A to 7-G, inclusive; and 2 volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal in the above-entitled case to the Ninth Circuit Court of Appeals.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 11th day of September, 1956.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15310. United States Court of Appeals for the Ninth Circuit. Sunland Industries, Inc., a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: September 14, 1956.

Docketed: October 1, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15310

SUNLAND INDUSTRIES, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

To Paul P. O'Brien, Clerk of the United States Court of Appeals:

Please Take Notice that pursuant to Rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, Appellant in the above-entitled matter herewith presents the points upon which it claims the Court erred:

Point I.

In finding that the Commissioner of Internal Revenue waived the regulatory requirement of filing a Form 991 with the return and allowed taxpayer the deferment for 1943. In failing to find that such waiver could only be made at the time of filing of the return and that there was no evidence in the record establishing any action by the Commissioner at such time.

Point II.

In finding that the reference to the 1942 claim together with the taxpayer's own course of conduct served to mislead the Commissioner. In failing to find Commissioner at all times knew or should have known all the facts needed to make a timely assessment of the taxpayer's 1943 tax liability. In failing to find that there was no evidence in the record establishing that the Commissioner in any way relied on the 1942 claim.

Point III.

In failing to find that the Plaintiff did not claim a reduction in taxes under Section 722 of the 1939 Revenue Code on its 1943 return and that Plaintiff did not show any amount as being such a reduction in taxes on said return. In failing to find that no application for relief under Section 722 was filed with said return and that no information in support of relief under Section 722 was shown on said return.

Point IV.

In failing to find that the Plaintiff did not comply with Regulation 112, Section 35.710-5 [formerly in 26 C.F.R.] as to the taxable year 1943. In failing to find that no application for relief on Form 991 was filed with the 1943 return, and that no information in support of a deferment under Section 710 (a) (5) of the 1939 Revenue Code was shown on said return.

Point V.

In failing to find that the sum of $78,130.71 constitutes the amount of tax and interest paid by the Plaintiff on December 14, 1949; that the general period of Limitation set forth in Section 275 of the 1939 Revenue Code applied to said amount; that such period of limitation expired on June 30, 1949; that said amount constituted a payment after the expiration of the period of limitation properly applicable thereto; and that Plaintiff is entitled to the refund of said amount.

Point VI.

In holding that the Commissioner had power or discretion to waive the requirements of Treasury Regulations compelling the taxpayer to file its return on an application for relief on Form 991. In failing to hold that the amount constituting a deferment under Section 710 (a) (5) is fixed and determined at the time the return is filed and that the Commissioner has no power or discretion to extend this time. In failing to hold that Treasury Regulations are equally binding on the Commissioner and taxpayer alike.

Point VII.

In holding that the Plaintiff's reference to the claim on file and the Plaintiff's course of conduct is a defense to its refund claim. In failing to hold that the Commissioner is charged to bring any improper returns to light before the period of

limitations expires. In failing to hold that a non-fraudulent mistake cannot deprive a taxpayer of the protection of the Statute of Limitations.

Point VIII.

In holding that the amount of Plaintiff's tax liability constituting a deferment under Section 710 (a) (5) could not be determined until its application for relief under Section 722 was considered in the regular fashion. In failing to hold that such amount is based solely on the amount of reduction in tax claimed at the time of filing of the return; that such amount is fixed and determined at the time of the filing of the return; and that the subsequent processing of the application for relief under Section 722 in no way affects the amount of deferment.

Point IX.

In holding that the Plaintiff put the Special Statute of Limitations under Section 710 (a) (5) into effect by invoking the relief provisions contained in the World War II Excess Profits Tax Law. In failing to hold that relief provisions under Section 722 can be invoked by filing application for relief at any time within three (3) years from the filing of the return; that deferment provisions in Section 710 (a) (5) can be invoked only by filing an application for relief at the time of the filing of the return; that the Plaintiff invoked the relief provisions under Section 722 by filing an application for relief two (2) years after the filing of

return; and that the Plaintiff did not thereby put the provisions of Section 710 (a) (5) into effect.

Point X.

In failing to hold that the provisions of Section 710 (a) (5) are invoked only where a taxpayer claims a reduction in taxes under Section 722 on its return; that the Plaintiff did not claim a reduction in taxes on its 1943 return; and that no amount of the Plaintiff's 1943 tax liability could constitute an amount deferred under Section 710 (a) (5).

Point XI.

In failing to hold that the provisions of Section 710 (a) (5) are invoked only where a taxpayer complies with Regulation 112, Section 35.710-5; that Plaintiff did not comply with said Regulation as to the taxable year 1943; and that no amount of the Plaintiff's 1943 tax liability could constitute an amount deferred under Section 710 (a) (5).

Point XII.

In failing to hold that the general period of limitations set forth in Section 275 of the 1939 Revenue Code properly applied to the $78,130.71, payment of tax and interest made on December 14, 1949, and that such payment was a payment after the expiration of the period of limitation properly applicable thereto.

Point XIII.

In failing to hold that the Plaintiff is entitled to judgment for the sum of $78,130.71, together with

interest at the rate of six per cent (6%) per annum [as provided in 28 U.S.C. 2411] from said date of payment until a date preceding the refund check by not more than thirty (30) days.

Point XIV, Which Is Claimed in the Alternative, and Only in the Event It Is Otherwise Determined That the Period of Limitations in Section 710 (a) (5) Applies.

In failing to find and hold that the Period of Limitation in Section 710 (a) (5) applies only to thirty-three per cent (33%) of whatever is determined to be the reduction in taxes under Section 722 shown on the return; that in any event it applies to no more than:

(a) 33% of the sum $38,768.03, being the reduction in tax which would result from applying the 1942 claim for relief figures to the taxable year 1943.

(b) 33% of the sum $45,494.32, being the amount of reduction claimed for the calendar year 1943 in the application for relief filed March 12, 1946.

(c) 33% of the sum $63,768.68, being the figure set forth opposite the caption on line 17 of the 1943 return.

In failing to find that the General Period of Limitations in Section 275 applies to the balance of the $78,130.71, payment of tax and interest paid on December 14, 1949, and that the Plaintiff is entitled

to judgment for said balance together with interest as provided in 28 U.S.C. 2411.

Point XV.

In denying Plaintiff's motion for a new trial, which said motion was based on the grounds that the Court decided the case before the Plaintiff submitted its Reply Brief, the Court having previously ordered that the cause be submitted on briefs, including Reply Brief.

Point XVI.

In overruling Plaintiff's objection to the introduction of a portion of Defendant's evidence, to wit, those facts found in paragraph VII of the Stipulation of Facts; which said objection was based on the grounds that said portion of the evidence related only to affirmative defenses which were not pleaded.

Dated this 28th day of September, 1956, at Fresno, California.

/s/ WILLIAM N. SNELL,
Attorney for Appellant.

[Endorsed]: Filed October 1, 1956.